Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Unbundled Access to Network Elements	)	**WC Docket No. 04-313**
	)	
Review of the Section 251 Unbundling	)	**CC Docket No. 01-338**
Obligations of Incumbent Local Exchange	)	
Carriers	)	

To: The Commission

REPLY COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.

REDACTED —
FOR PUBLIC INSPECTION

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EXECUTIVE SUMMARY

MISCHARACTERIZATIONS OF *USTA II*.

The IXCs and CLECs acknowledged to the Supreme Court that *USTA II* limited unbundling to "the bare minimum," permitted only when the Commission can make "extraordinary findings" of impairment. They now tell the Commission the opposite — that *USTA II* poses no obstacle to maximum unbundling. If the Commission follows their advice, it will face yet another reversal by the D.C. Circuit.

Presumptive National Impairment Findings Not Possible.

USTA II held that an evidentiary finding of impairment is a specific prerequisite to unbundling. The Commission has the burden to justify a finding of impairment; *USTA II* does not permit the Commission to shift the burden to ILECs to prove non-impairment. The IXCs and CLECs turn the case on its head when they argue that *USTA II* allows the Commission to make a presumptive national impairment finding and readopt as FCC rules the "triggers" that states previously would have used to determine whether an ILEC can show non-impairment and become exempted from unbundling. In fact, CLECs are not impaired and thus the ILEC is exempt from unbundling.

Moreover, *USTA I* rejected a prior national impairment "finding" that was "detached from any specific market or market categories" and required a more detailed, "nuanced" analysis of impairment. In this analysis, the Commission must consider whether an "efficient competitor" will be impaired over the "entire extent of the market," not a new entrant who has higher costs.

The "nuanced" analysis that the *USTA* decisions require must take into account the facts pertaining to each relevant market. Amazingly, the IXCs and CLECs seeking a national impairment finding argue for the relevant market to be defined at the most granular level, an individual fiber route, but present no evidence concerning impairment for any such purported relevant market. Individual routes are not appropriate for use as the relevant market, however; competitors do not enter an area to provide a single loop or transport route; they make business plans covering a larger market, such as an MSA or an RBOC region, and their business plans are tied to their own facilities, such as fiber rings, in such markets. Thus, the relevant geographic market must be a reasonably large area where one or more competitive carriers are currently providing service and are able to serve additional customers.

A national impairment finding cannot be made without detailed data that takes into account the extensive variations among geographic areas. Both *USTA I* and *USTA II* forbid such an approach. For example, AT&T's own pricing model indicates that the cost of laying fiber can vary from less than $10,000 per mile to nearly $400,000 per mile. Using broadly averaged cost data, based on expensive urban areas (such as AT&T's figure of $125,000 per mile), will seriously overestimate the level of impairment in lower-cost areas, such as low-density and rural areas. Given the wide disparity among markets, it would be arbitrary and capricious for the Commission to make a national impairment finding based on generic data. How ever it defines the relevant market, it must consider the geographically disparate characteristics of those markets.

Neither the National Impairment Findings nor the "Triggers" Survived USTA II.

The IXCs and CLECs claim that the *TRO* remains largely intact and can be reinstated merely by discarding the delegation of authority to the states that the Court found unlawful. Some actually claim that the Court effectively endorsed or affirmed the national impairment findings and triggers in the *TRO.* In fact, the triggers were never considered at all because the regime under which they were to be applied was fundamentally unlawful. The Court likewise did not endorse the national impairment findings with respect to loops, transport, or switching, but it raised doubts as to their validity. Moreover, both the national findings and the triggers were developed without consideration of intermodal competition or the availability of special access, both of which the Court found necessary. As a result, any claim that these have already implicitly passed judicial muster lacks merit. In addition, the *TRO*'s triggers were unlawful because the presence of a single competitor in a market demonstrates the lack of natural monopoly characteristics of that market.

Intermodal Competition Cannot Be Ignored.

Some commenters claim that intermodal competition can be safely deemed irrelevant. *USTA II*, however, said that the Commission "cannot ignore intermodal alternatives." The Commission must consider both current sources of intermodal competition and those that are reasonably feasible in a given relevant market, given their track record in other similar areas. Such intermodal competition is relevant in two ways: First, it demonstrates that an efficient competitor is not impaired. Second, it is an important factor weighing against unbundling during the balancing process that follows a finding of impairment.

The Existence and Use of Tariffed Special Access Is Critically Important.

The IXCs and CLECs who argue that the existence and use of special access is "irrelevant" ignore the clear holding of *USTA II* on this issue: "[T]he Commission's impairment analysis must consider the availability of tariffed ILEC special access services." Ironically, the IXCs and CLECs ask the Commission to consider only self-provisioning as an alternative to unbundling, without considering other alternatives from the ILEC, which the Court specifically stated is "[w]hat the Commission may not do." Moreover, they ignore the Court's holding that the existence of a special access alternative and its use in a competitive market "precludes" an impairment finding.

The existence of a tariffed special access alternative to a requested UNE has several critical impacts:

- Under no circumstances can an existing special access circuit, or part of such a circuit, be "flipped" to UNE prices by the purchaser. The fact that the circuit has been purchased at tariffed prices is conclusive evidence that the purchaser is not "impaired" by having to pay the tariffed rate.

- The fact that an IXC or CLEC has purchased a special access circuit to a particular customer, or along a particular route, is conclusive evidence that that particular route is "suitable for competition" without making additional special access circuits available to that customer or along that route to the carrier who has purchased the circuit.

- The fact that an IXC or CLEC has purchased a special access circuit to a particular building, or along a particular route, is conclusive evidence that other carriers are not impaired without access to special access "UNEs" to that building or along that route.

- The fact that tariffed special access is being utilized by CLECs within a particular wire center disproves the possibility of impairment within that wire center for special access "UNEs."

The IXCs and CLECs claim that special access prices are too high, and that ILECs are able to engage in a "price squeeze." The limited evidence that they present, however, shows that special access is not priced unreasonably; in many cases it would cost more to build new fiber than to use special access, even though construction costs would be similar for CLECs and ILECs. The main problem with the price squeeze claims, however, is that they are premised on the assumption that the FCC cannot or will not carry out its statutory duties, even though the case law indicates that the Commission does enforce the relevant statutory requirements. Moreover, this is not the appropriate proceeding for consideration of price squeeze issues.

NO IMPAIRMENT WITH RESPECT TO HI-CAP LOOPS AND TRANSPORT.

The IXCs and CLECs effectively assume the existence of a natural monopoly with respect to loops and transport (due to a "ubiquitous" fiber optic network reaching every potential customer) at the outset of their cost/revenue analysis, at the conclusion of which they find themselves impaired due to the natural monopoly they assumed. Obviously, this is not a valid way to proceed. Ultimately, they are impaired, if at all, by their own inefficiency and not by any natural monopoly characteristics of the ILECs' networks.

AT&T, in particular, engages in an elaborate "business case" analysis to show that it is impaired at the precise levels corresponding to the Commission's *TRO* triggers. Its business case, however, would never be adopted by any rational competitor. Basically, AT&T assumes that it will always build a new underground conduit and fiber facility to meet a new DS1 or DS3 customer requirement and that all of the costs of this deployment must be covered by committed customer revenue at the outset. It also assumes that the ILEC will always be able to serve the customer at no incremental cost with its existing fiber network. Not surprisingly, AT&T finds that it is impaired by the natural monopoly characteristics of the ILEC's network. The only problem with this analysis is that every assumption in it is erroneous.

First, ILECs do not have ubiquitous fiber networks, constructed during the pre-1996 monopoly era, that can serve every business customer with infinite capacity at no incremental cost. AT&T makes no attempt to show that these networks exist. In Qwest's case, there is no such thing. Qwest does not have fiber reaching virtually all enterprise customers; it constructs large quantities of new fiber every year. Moreover, AT&T ignores the fact that if the ILECs' networks were actually as ubiquitous as it claims, AT&T would have the right to use the ducts and conduits in that network for its own fiber, at a cost one-fifteenth that of the new construction AT&T asserts to be necessary.

Second, AT&T's assumption that it will only serve a customer if it can recover the cost of the facility from the customer's committed revenue runs afoul of *USTA II*, which measures

whether there are natural monopoly advantages over the entire extent of the market. This requires consideration of the potential revenue that could be generated from the initial customer and additional customers.

Third, AT&T assumes that it will always use the most expensive way of serving the customer — construction of new underground conduit and fiber — and ignores less expensive alternatives in its cost/revenue analysis. It fails to consider the cost savings that would be possible by using aerial pole lines, buried cable, leased ILEC conduit space, copper loop UNEs (using HDSL technology), or other carriers' fiber.

Fourth, AT&T inflates its transport cost by including its own opportunity cost of using capacity on its metropolitan fiber ring.

Fifth, AT&T's cost estimates ignore the fact that "virtually all" of its DS1s and DS3s are deployed over its own existing facilities, the cost of which would already have been recovered from the customer's initial revenue commitment. Apparently only a small number of AT&T's DS1s and DS3s involve new fiber, even though AT&T presumes new fiber uniformly in its business case analysis.

Sixth, the other obstacles that AT&T claims impede its deployment of competitive fiber (obtaining rights of way, overcoming physical obstacles, obtaining building access, customer reluctance to move their service, delays in facility construction, and volume and term provisions to which AT&T agreed in its special access contracts) are all irrelevant to an impairment analysis.

FACILITIES-BASED BUSINESS COMPETITION IN QWEST'S REGION.

USTA II requires the Commission to consider competition — including intermodal competition — in the market as part of its impairment analysis. The existence of competition within a market demonstrates that the market is not a natural monopoly — which precludes a finding of impairment. Qwest's Comments demonstrated that there is facilities-based competition nationwide for voice and broadband services. Nonetheless, some commenters assert that intermodal competition is not sufficiently mature or comparable to ILEC voice services. These claims are baseless. Qwest is experiencing facilities-based competition throughout its region — including in its smallest markets — from cable operators, independent telephone companies, municipalities, and competitive carriers who entered the market after the Telecommunications Act of 1996 was passed. For example:

- Qwest faces substantial facilities-based competition from cable operators who provide the "triple play" of telephone, internet access and video service to customers. In its Omaha market, Qwest has lost significant market share to Cox's circuit-switched telephony service. Bresnan is competing with Qwest in Montana, Wyoming, and Colorado. Cable operators are competing with Qwest even in very small communities — with fewer than 200 Qwest business access lines

- A substantial number of small/medium enterprises ("SMEs") are within *existing cable company footprints.*

- There are 6.98 million SMEs within the United States — more than 6.27 million of them are located within the operating areas of cable operators

- The SMEs located *within existing cable footprints* represent *48.9 million business lines*

- Cable operators already provide facilities-based service to business customers

  - Cable operators began making significant upgrades to their networks in the mid-90s by building hybrid fiber/coax networks to increase capacity so they could offer additional services

  - *Currently, there* are *more than 3.13 million SMEs located within two-way capable operating areas of cable operators*

  - Cable operators including AT&T Broadband, Cablevision, Charter, Cox, and Time Warner all target and provide facilities-based service to business customers. Cox had 100,000 business customer locations as of year-end 2003 — 90% of which have fewer than 21 employees. Cablevision stated that it expects to garner a 50% market share of SMEs within its territories by 2007. Bresnan recently reported that it has signed over 1,000 business customers

- Cable operators have a very substantial opportunity to serve additional business customers *that are within their existing footprints*

  - Cable operators' existing footprint can generate substantial additional revenues from SMEs with minimal additional costs, since they already pass those SMEs (just as they do residential customers) and can use the same cable modem installation for SMEs as they do for residential customers

  - If all cable systems offered two-way capable telephony, *90.7% of all SME business lines would reside within cable operator markets*

  - If cable operators bundle voice with the cable modem service, the economics become even more compelling — the total revenue outlook for bundled data and telephony services from SMEs is $2.5 billion, assuming a conservative penetration rate of 15%

  - In Qwest's region alone, approximately 360,000 SMEs, representing 2.9 million SME lines, are at risk from cable competition (from *existing* cable footprints)

- In total, ILECs could be at risk of losing more than 24 million LEC business lines, or 50% of the SME business lines in the US, if broadband deployment of cable telephony occurs within the two-way cable plant

- Qwest also faces facilities-based competition from ICOs, municipalities, and competitors that entered the market post-1996. There are fiber collocations in 210 of Qwest's wire centers, many of which have fewer than 5,000 Qwest business access lines

  - Independent telephone companies have overbuilt portions of Qwest's networks in Idaho, Iowa, Minnesota, Montana, New Mexico, Oregon, South Dakota, and Wyoming and are providing facilities-based service in these areas, almost all of which have fewer than 5,000 Qwest business access lines

  - Municipalities have overbuilt portions of Qwest's network in Iowa, New Mexico, Oregon, Utah and Washington and are providing facilities-based services — again in areas with fewer than 5,000 Qwest business access lines

The extensive evidence of facilities-based competition for voice and broadband services within Qwest's markets demonstrates that these are not natural monopoly markets, and that switching, loop and transport facilities are not bottleneck monopoly facilities. Since any finding of impairment must be linked to structural barriers that arise from natural monopoly markets, no impairment can be found with respect to these network elements.

Some of the commenting parties suggest that the Commission use certain data as a surrogate to identify where competition exists or could exist, and where competitors thus are not impaired without unbundled access to a network element. The Commission does have the authority to adopt surrogates or proxies regarding competition, but *USTA II* requires that any such proxy be flexible enough to reflect where competition currently exists as well as where a market is suitable for competition. The existence of, or potential for, competition in a market is central to the impairment analysis, and any proxy test adopted cannot lose sight of this core factor. As Qwest demonstrates herein, it faces substantial facilities-based competition within its region, even in the smallest of wire centers in rural areas. These facts cannot legally be ignored.

CIRCUIT FLIPPING.

USTA II does not permit the Commission to allow existing special access circuits to be converted to UNEs. The existence and use of such circuits demonstrates conclusively that the carrier using them is not impaired, at a minimum. If other carriers can obtain UNEs, however, the Commission needs to provide safeguards against gamesmanship. In particular, it should not permit evasion of a circuit-flipping prohibition through cancellation and reordering of a circuit. An additional, more effective safeguard would be to require that all service to a given customer location currently served by special access continue to be by special access, rather than UNEs, including additional lines and lines provided by other carriers.

ENTRANCE FACILITIES.

There is no basis to require the unbundling of entrance facilities. As Qwest has shown, CLECs are not impaired without access to high capacity transport because of the widespread availability of competitive fiber and the opportunities for self-provisioning. Entrance facilities present the greatest opportunities for aggregation of traffic and thus the least compelling case for unbundling. Unbundling also should not be required because, even if CLECs were impaired without access to entrance facilities as a UNE, the impairment would not be tied to any natural monopoly characteristic of the facility.

IXCs SHOULD BE INELIGIBLE FOR UNES AND EELS.

The Commission should reject IXC commenters' requests the elimination of all usage and eligibility restrictions on both EELs and UNE loops and transport. The Commission must prevent the use of UNEs and EELs for the carriage of IXC traffic, because the long-standing and vigorous competition that has occurred in the IXC segment even as IXCs have used special access, demonstrates a lack of impairment.

The Commission should strengthen its local service requirements that prohibit carriers from using UNEs to provide ineligible services. Any CLEC seeking UNEs or EELs should be required to certify that it is providing local service over the circuit in question, including the local telephone numbers associated with each DS1 and other relevant information, and CLECs should be required to produce records in the event of an ILEC audit to show that their traffic on the UNE or EEL is predominantly local. The Commission should adopt SBC's proposed changes to the service eligibility safeguards.

SWITCHING.

Qwest demonstrated in its Comments that competitors are not impaired on a nationwide basis with respect to mass market switching based upon the broad deployment of competitive switches, substantial facilities-based intermodal competition in the provision of mass market voice services, and the existence of the QPP Agreement which provides continued access to switching services at commercially negotiated rates and to Qwest's batch hot cut process at reduced rates. In recognition of these uncontroverted facts and circumstances, AT&T, once a primary proponent of UNE-P, is no longer urging the Commission to require unbundling of mass market switching. Other commenting parties, however, continue to allege that unbundling is necessary. Some of these claims are based on general assertions that there are economic barriers to entry, claims which both the Commission and the Court in *USTA II* already have dismissed, and which are belied by the deployment of close to 10,000 competitive switches. Other of these claims are based on allegations that operational barriers exist, such as lack of access to loop-related information and effective batch hot cut processes. However, as Qwest demonstrates herein and in its Comments, Qwest's processes for loop migrations address the CLECs' and state commissions' concerns — including in the context of its batch hot cut process. Even if these alleged operational barriers did still exist, they would not justify a finding of impairment. The Court in *USTA II* ruled that the FCC must consider reasonable, narrowly-tailored alternatives before imposing costly unbundling requirements on incumbents.

SECTION 271.

The Commission must reject CLEC proposals to subject network elements that are not required by section 251 (including those that BOCs are required to offer pursuant to items 4-6 and 10 of the section 271 competitive checklist, and others that they offer pursuant to commercial arrangement without any statutory obligation to do so) to the regulatory trappings of section 251. The pricing and terms for these elements are subject to the "just, reasonable, and nondiscriminatory" standard of sections 201 and 202 and the federal filing requirement of section 211(a). There is no basis to for state commissions to assert jurisdiction over the pricing or terms of these agreements, or to require their filing at the state level. As the Commission previously has held, there is no duty to combine elements not provided pursuant to section 251.

LINE SHARING.

Some commenting parties urge the Commission to reverse its earlier decision and reinstate line sharing. The Commission's decision to eliminate the unbundling requirement with respect to the high frequency portion of the loop ("HFPL") was correct, has been affirmed on appeal, and the commenting parties have failed to justify a reversal of that earlier decision. In fact, some of the comments filed in support of unbundling actually bolster Qwest's arguments that line sharing should not be reinstated. As Qwest explained in its Comments, and some of the commenting parties confirm in their filings, competitors will use line sharing to engage in arbitrage — they will secure the HFPL at a TELRIC price of close to zero, and will offer packages of voice and data services using VoIP technology, and will reap huge profits at the expense of the ILECs. The Commission's rules should not create opportunities and loopholes by which competitors can enjoy huge profits subsidized by other carriers. The Commission should affirm its decision on line sharing.

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To: The Commission

COMMENTS

Qwest Communications International Inc. ("Qwest") hereby submits its Reply Comments, addressing points made in several comments filed in response to the Commission's *Order and Notice of Proposed Rulemaking*.[1]

INTRODUCTION

The IXCs and CLECs make clear in their comments that they want the maximum number of network elements unbundled to the greatest possible extent. The attraction of below-cost TELRIC prices blinds them to the fact that the Commission has had its rules vacated three times in a row for catering to their desires instead of complying with the statute. Given the case law to date, this much is clear: The "touchstone"[2] for whether an ILEC must unbundle a nonproprietary network element is whether an efficient competing carrier (*i.e.*, using "the most efficient network

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1 *Unbundled Access to Network Elements*, WC Docket 04-313, *Order and Notice of Proposed Rulemaking*, (*Order and NPRM*), 19 F.C.C.R. 16783 (2004).

2 *United States Telecommunications Association v. FCC*, 290 F.3d 415, 425 (D.C. Cir. 2002) (*USTA I*), *cert. denied*, 123 S.Ct. 1571 (2003); *United States Telecommunications Association v. FCC*, 359 F.3d 554, 572 (D.C. Cir. 2004) (*USTA II*), *cert. denied*, __ S.Ct. ___ (Oct. 12, 2004).

architecture" and "the most efficient business model")[3] would be "impaired" by the ILEC's failure to provide that network element as a UNE[4] because the element is "unsuitable for competitive supply" due to" natural monopoly" characteristics "that would make genuinely competitive provision of an element's function wasteful."[5] The D.C. Circuit has explained that this depends on whether "economies of scale" exist "*over the entire extent of the market*," not merely "*the early stages of entry*," because "average unit costs are necessarily higher at the outset for any new entrant into virtually any business."[6] Under this standard, the Commission cannot find carriers impaired with respect to low levels of service to a single customer (such as the "triggers" that the IXCs and CLECs seek to resurrect for loops and transport). Cost disparities not tied to natural monopoly advantages of the ILEC are not a basis for finding impairment.

The Courts have also made clear that unbundling is itself not an unmitigated good and carries with it significant potential harm of its own, especially if the price of the resultant unbundled elements is at the low end of lawful.[7] Accordingly, the Commission must consider all reasonable alternatives to the unbundling of a network element.[8] This is because unbundling, especially at very low TELRIC prices, risks undercutting the objectives Congress has sought to achieve in both the Communications Act and the Telecommunications Act of 1996. The primary

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3 See Qwest Comments at 16-17 (advising that the Commission already answered the Court's question of "which carrier" the impairment standard should be applied to).

4 47 U.S.C. § 251(d)(2).

5 *USTA I*, 290 F.3d at 427.

6 *USTA I*, 290 F.3d at 427 (emphasis in original; internal quotation marks and citations omitted).

7 *USTA I*, 290 F.3d at 427; *USTA II*, 359 F.3d at 562-63.

8 *USTA II*, 359 F.3d at 563.

statutory objectives are facilities-based competition and stimulation of investment and innovation.[9]

Congress sought to bring American telecommunications consumers the benefits of *real* competition, not to give a windfall to non-facilities-based competitors. Congress also sought to stimulate investment by both incumbents and new entrants in the interest of the rapid deployment of new telecommunications technologies,[10] but mandatory unbundling, particularly at very low prices, discourages such investment and innovation. Accordingly, the Courts have required the Commission to consider alternatives to a UNE that are available from the ILEC itself (*e.g.*, through tariffed special access, wholesale discounts from retail rates, or commercial intercarrier agreements[11]), from third parties, or through self-provisioning.[12]

Intermodal competition is a key factor that must be considered in determining whether an efficient competitor would be impaired, because the existence of such competition disproves natural monopoly.[13] It would be arbitrary and capricious for the Commission to order the un-

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9 *USTA II*, 359 F.3d at 562.

10 *See, e.g.*, Telecommunications Act of 1996, Pub. L. No. 104-104, Preamble, 110 Stat. 56 (1996) ("An Act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies"); *id.*, § 706, 110 Stat. 153, codified at 47 U.S.C. § 157 note (urging the Commission not only to foster competition but also to use "regulating methods that remove barriers to infrastructure investment.").

11 Sprint argues that the Commission should not consider commercial agreements, asserting that the RBOCs have no incentive to reach such agreements, which is why "virtually" no agreements were reached in response to the FCC's request for carrier negotiations in the wake of *USTA II*. Sprint Comments at 38. Sprint carefully chose the word "virtually," as it must, since Qwest did reach commercial agreements with multiple CLECs for both switching and line sharing. Qwest Comments at 55-59, 104-105. Where there is evidence that such agreements actually exist, the FCC must consider such evidence in its impairment analysis. Indeed, the existence of such agreements precludes a finding of impairment. What is more, as is discussed below, a powerful market incentive for ILECs to enter into such contracts already exists.

12 *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 389 (1999) (*Iowa Utilities*); *USTA I*, 290 F.3d at 418; *USTA II*, 359 F.3d at 577.

13 *USTA I*, 290 F.3d at 428-29; *USTA II*, 359 F.3d at 572-73; *see Iowa Utilities*, 525 U.S. at 428 (Breyer, J., concurring in part and dissenting in part).

bundling of an element where the service sought to be provided is already competitive as a result of facilities-based intermodal competition, whether or not the intermodal competitors make their facilities available to others. Intermodal competition proves that an efficient competitor is not impaired without access to UNEs, thus precluding any finding of impairment. Moreover, the statutory objective of allowing consumers to choose from the offerings of facilities-based competitors is achieved through intermodal competition. Requiring the ILEC, but not the intermodal competitor, to unbundle for the benefit of non-facilities-based carriers would actually hobble the facilities-based competition and investment that Congress sought to achieve.

DISCUSSION

I. THE IXCS AND CLECS MISCHARACTERIZE AND DISTORT THE *USTA II* DECISION

The IXCs and CLECs seek to minimize the importance and impact of the *USTA I* and *USTA II* decisions, generally arguing that they constituted minor bumps along the road toward their chosen path of maximum unbundling of ILEC facilities at TELRIC prices.[14] These arguments totally mischaracterize the *USTA* decisions, particularly *USTA II*.

By way of background, it is instructive to note that these parties have substantially changed their positions on several key issues — they now take the position that *USTA II* holds the opposite of what they told the Supreme Court it held. The IXCs and CLECs represented to the Supreme Court that *USTA II* required the Commission to cut back unbundling to "the bare minimum":

[14] *See, e.g.*, AT&T Comments at 7-12; CompTel/Ascent Comments at 6-15; MCI Comments at 22-26.

> [T]he D.C. Circuit imposed a series of additional conditions designed to limit unbundling to the bare minimum necessary to allow some type of competition in each market and which, the court stated, meant that the FCC's "task" would be one of "extraordinary complexity."
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> . . .
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> [T]he D.C. Circuit held that the purported "goals of the Act" . . . require the FCC to "limit" the scope of unbundling to the bare minimum essential to allow some type of competition — even if the resulting unbundling rules that are "underinclusive."[15]

Their Reply Brief was equally specific:

> On the one hand, if the FCC were to readopt its national unbundling requirements for mass market switching and transport, these rules will again be reviewed by the D.C. Circuit which again will ask if the FCC has made all the extraordinary findings that, in the D.C. Circuit's view, are necessary before presumptively harmful unbundling can be ordered even in the face of overwhelming evidence of impairment.[16]

Having represented to the Supreme Court that *USTA II* held that the statute requires the Commission to limit unbundling to cases where there is "extraordinary" evidence of impairment, the IXCs and CLECs should not now be heard to take the opposite position. Not surprisingly, however, they *have* reversed themselves about what the *USTA* decisions require. The Commission should not be deceived, however. Following the advice of the IXCs and CLECs and ignoring the unusually clear guidance provided in *USTA II* undoubtedly *will* result in yet another *vacatur*.

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[15] Petition for a Writ of Certiorari of AT&T, MCI, *et al*., No. 04-15 (U.S. Supreme Ct., June 30, 2004) at 23-24.

[16] Reply to Brief of AT&T , MCI, *et al*., No. 04-15 (U.S. Supreme Ct., Sept. 14, 2004) at 9.

A. *USTA II* Does Not Permit a Presumptive National Finding of Impairment

AT&T and others argue that the FCC should return to the national presumptive finding of impairment adopted in the *TRO,* and merely fix one legal error — the delegation of authority to states to override that presumption, which *USTA II* found unlawful[17] — by adopting its own rules for overriding the presumption.[18] This approach cannot be squared with the *USTA II* decision, especially when taken together with *USTA I* and the Supreme Court's *Iowa Utilities* decision.

In *USTA II,* the Court held that an evidentiary finding of impairment was "a specific statutory requirement" that must be satisfied before unbundling can be ordered.[19] Indeed, the language of the statute expressly permits unbundling *only* after the Commission, "at a minimum," makes a finding that a requesting carrier is impaired by an ILEC's failure to provide a requested network element on an unbundled basis.[20] Plainly, a ruling that CLECs across the nation are presumed to be impaired as to a given network element, or particular quantities of that network element, does not satisfy this requirement. The burden is on the Commission to find where impairment exists based on an evidentiary record, and the Commission cannot shift the burden to the ILEC to disprove that CLECs are impaired, by making a rebuttable national "finding," as the IXCs and CLECs ask.

In *USTA I,* the Court vacated the Commission's previous attempt to make a national "finding" of impairment. It noted that the Supreme Court had rejected a blanket national im-

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17 AT&T Comments at 22-25; ALTS Comments at 35, 37-8, 52-60, 67-70, 75-77, 77-86; CompTel/Ascent Comments at 25-27, 40; Loop and Transport CLEC Coalition Comments at 88-92; MCI Comments at 125-37, 144-45.

18 *See., e.g.*, AT&T Comments at 22-25; CompTel/Ascent Comments at 25-27.

19 *USTA II*, 359 F.3d at 569.

20 47 U.S.C. § 251(d)(2).

pairment finding in *Iowa Utilities* because Congress had not indicated any intention to make impairment the norm.[21] The Court therefore rejected an impairment finding that was "detached from any specific markets or market categories" and required the FCC to employ a "more nuanced concept of impairment."[22]

1. The Commission Must Determine Whether an "Efficient Carrier" Would Be Impaired in the Market as a Whole

The IXCs' and CLECs' nationwide analyses abstract away the existence of all competition and market characteristics and are completely inconsistent with the "efficient carrier" standard adopted in the *TRO* and required by *USTA II*. Some commenters go so far as to claim that the Commission must find impairment on every route nationwide, unless it would be economic for virtually any carrier to deploy its own fiber.[23] AT&T, for example, identifies a long list of factors that, it claims, make entry uneconomic for particular carriers to deploy their own loops or transport to serve particular locations: the carrier's fiber ring is too far from that location; the carrier has chosen to hub traffic from a different wire center; the carrier has not yet won the customer or received sufficient capacity demands from that customer.[24] In AT&T's view, "the mere fact that one, or two, or three carriers may have had enough traffic to build on a route — at some time in the past — does not mean that any *other* carrier with the same amount of traffic would be able to build on that same route in the future."[25] AT&T focuses exclusively on a new carrier's

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21 *USTA I*, 290 F.3d at 425-26, *citing Iowa Utilities*, 525 U.S. at 390.

22 *USTA I*, 290 F.3d at 426.

23 AT&T Comments at 13-22; CompTel/Ascent Comments at 36; Loop and Transport CLEC Coalition Comments at 31-36.

24 AT&T Comments at 44-45.

25 AT&T Comments at 63.

inherent obstacles and high costs at start-up in order to avoid the real issue: whether the market as a whole is suited to competitive supply. *USTA II* rejected this approach, given that new entrants always have higher costs, and required the Commission to focus on whether competitive supply is possible in the long term, considering the entire extent of the market. The IXCs and CLECs cannot meet this standard, so they distort the Courts' holdings.

2. Proper Determination of the Relevant Market Is Critically Important

The analysis required by *USTA I* must take into account the facts pertinent to each relevant market where impairment allegedly exists. Amazingly, some of those arguing for a *national* impairment finding, undifferentiated by market, nevertheless claim that the relevant market for impairment is granular in the extreme, depending on the particular carrier, level of capacity, switch location, and point-to-point route.[26] If the relevant market were this granular, no national impairment finding could logically be made unless evidence were adduced for each carrier, capacity level, switch location, and route that supported an impairment finding for each and every such "market." Not surprisingly, the advocates of such highly localized relevant markets fail to present such evidence.[27]

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[26] *See* AT&T Comments at 13-22; CompTel/Ascent Comments at 13-16; Loop and Transport CLEC Coalition Comments at 30-36.

[27] *See, e.g.,* ALTS Comments at 38-46, 52-60 (seeking nationwide impairment finding for DS0 loops, subloops, and DS1 loops), 67-70 (seeking nationwide impairment finding for dark fiber loops), 75-77 (seeking nationwide impairment finding for DS1 transport facilities), 77-86 (seeking an MSA-based finding for DS3 and dark fiber transport facilities based on generic information that does not include Qwest's states, since Qwest decided to focus first on mass market switching proceedings, knowing that it could proceed with loop and transport proceedings at a later date, which plan ultimately was mooted by the *USTA II* decision; MCI Comments at 125-137 (seeking nationwide impairment finding for loops and transport, also based on generic information that does not include Qwest's states for the reasons stated above, with triggers used only to identify exceptions to impairment), 144-145 (seeking blanket finding for DS1 transport); Covad Comments at 69 (seeking national finding for DS1 loops based upon Covad's assertions that it has not found alternate suppliers of those facilities, but no other evidence or data), 71 (seeking national finding for DS3 loops below the threshold based upon general assertion that it would be difficult

(footnote continued)

A single route cannot be a relevant market for the purpose of competitive analysis. No competitor enters a local area to provide a single loop or a single transport route. A competitor's viability does not turn on its ability to provide a single circuit. Instead, reasonable and efficient competitors make business plans based on the total potential revenues available in a larger "market," such as an MSA, an RBOC region, or a portion of a city, depending on its business plans. The advocates of a route-by-route market do not claim that their business plans entertain self-provisioning a fiber-optic loop or transport circuit in metropolitan areas where they lack existing fiber facilities. Their business plans are intimately tied to the existence of facilities above and beyond a particular route that will make a circuit along that route easier to deploy, such as partial ownership of a fiber ring in a given metropolitan area.[28]

The relevant geographic market must, therefore, be a region where one or more competitive carriers are currently providing service and are capable of serving additional customers, as opposed to a single route. The fact that it may not be economical for a CLEC to construct a single circuit in isolation says absolutely nothing about the ability of a CLEC to provide service successfully within the totality of a rationally defined market. A reasonable and efficient CLEC will assess the total market and determine which mix of its own facilities, facilities shared with other carriers, facilities obtained from others, and ILEC special access services will best enable it to provide a profitable service in that larger market, taking into account ancillary services that it will provide in addition to local exchange service, such as long-distance, data services, *etc.* A

(footnote continued)
for any commission to undertake the trigger analysis to find the few instances of where the triggers are satisfied, so the Commission should simply adopt a blanket finding of impairment), 73-78 (seeking nationwide impairment finding for transport facilities based upon empirical data that it suggests is sufficiently representative to warrant such a blanket determination — notwithstanding that the data pertains to only a handful of states); *see also* Comp-Tel/Ascent Comments at 25-27, 40; Loop and Transport CLEC Coalition Comments at 88-92.

[28] *See, e.g.*, AT&T Comments, Att. C at 12.

carrier cannot be considered "impaired" if it is able to conduct business competitively in its chosen market area, even if providing a particular loop is not economically feasible in the short term. In short, a given route or switch cannot rationally be considered a relevant market.

3. Nationwide Impairment Findings Cannot Be Based on Highly Granular, Route-by-Route Relevant Markets

The IXCs and CLECs who advocate route-by-route relevant geographic markets present no evidence with respect to any of the specific "relevant markets," just as they have resisted requests for such data in state proceedings.[29] Nevertheless, they argue for *nationwide* impairment findings that do not take *any* market-specific data into account and use nationally averaged data in widely diverse areas instead.

AT&T, for example, argues that the Commission can adopt a nationwide impairment finding based on a single carrier's non-market-specific, geographically averaged data. AT&T contorts the Court's warning that the Commission cannot "ignore facilities deployment along similar routes" into blanket permission to reach an impairment decision for *all* geographic markets nationwide, urging the Commission to "clarify" that "it has considered any such circumstances in determining that impairment exists below the capacity thresholds" everywhere in the nation.[30] Any such "clarification" based on AT&T's filing would be invalid. AT&T did not present evidence concerning "any such circumstances." It provided generic data, concerning only

[29] CLECs have been reluctant to provide ILECs or even state commissions with data regarding their deployment of competitive facilities. See Attachment 1, Declaration of David Teitzel (Teitzel Declaration) As that declaration describes, CLECs refused to provide relevant data in the context of state commission TRO proceedings in Qwest's region. If CLECs seek impairment findings for network elements, they must be required to provide information relevant to the Commission's determination.

[30] AT&T Comments at 17; *see also* CompTel/Ascent Comments at 16-20; Loop and Transport CLEC Coalition Comments at 88-92.

its own circumstances, that had been averaged across greatly differing geographic areas. And, as discussed in Section II.B, even that data is seriously flawed.

The generic nature of AT&T's data makes clear that it is not universally applicable to all geographic areas. For example, AT&T admitted its own "unit cost of outside plant investment" associated with fiber optic deployment "falls within a wide range," and the publicly available data, which it said were consistent with its own experience, indicated that the costs, *even in the three highest population density zones*, vary from $114,000 per mile to $396,000 per mile before sharing among carriers.[31] The range of costs is even wider when lower population density areas are considered. In its November 2002 *ex parte*, AT&T cites HAI cost estimates for fiber route excavation, installation, and restoration ranging from $1.77 per foot, or $9345.60 per mile, for buried cable in low-density areas to $75.00 per foot, or $396,000 per mile, for underground conduit in high-density areas.[32] Despite this broad range, AT&T uses a $125,000 per mile fiber construction cost, based on the most expensive type of fiber deployment in the costliest high-density areas, in arguing that CLECs are impaired nationwide, even though this overstates the cost of fiber deployment in low-density areas by more than 1000%.

Given the wide disparity among markets, it would be arbitrary and capricious for the Commission to make a national finding of impairment based on the characteristics of the most expensive markets, much less an average of all the disparate markets. It must make findings with respect to the relevant geographic markets, which will differ significantly whether it uses

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31 AT&T Comments, Att. C. at 11 & n.9.

32 *See* Letter from Joan Marsh, AT&T, to Marlene Dortch, FCC, Docket Nos. 01-338, 96-98 and 98-147, Nov. 25, 2002, Ex. A at 2 *(AT&T Ex Parte*); *see also* HAI Consulting, Inc., *HAI Model Release 5.0a, Inputs Portfolio*, <http://www.hainc.com/hminputs.pdf>.

RBOC regions, MSAs, or individual routes. It cannot make a finding of impairment for a given relevant geographic market by considering only averaged cost data that are unrepresentative of particular relevant markets.

Regardless of how the Commission defines the relevant geographic markets, it must consider the geographically disparate characteristics of those markets. It cannot decide that competitive carriers are impaired in all relevant markets based on data that pertain only to markets with certain characteristics; it simply cannot find carriers impaired in Omaha or Sioux City based on the feasibility of competition in New York or Boston.[33] And if the Commission finds impairment in any given relevant market, it will then have to determine the extent to which any such impairment is offset by facilities-based intermodal competition that is present or feasible in such market — a factor that differs greatly from region to region.

In short, the Commission cannot define the relevant market at a highly granular level and then "loftily abstract[] away all specific markets," ignoring the need to examine the data pertaining to whether network elements are suitable for competitive supply in each relevant market that

[33] For example, if the Commission were to decide that the relevant market is each individualized fiber route, at a minimum it would have to make factual findings for routes with similar costs and competitive circumstances before it could find any competitor impaired on such routes. Making individual route-by-route fact-based impairment findings would obviously be administratively infeasible; the Commission would never be able to determine whether impairment exists in all of the relevant markets, so no unbundling could be required. If it employed route-by-route markets, the Commission could consider similar routes together, but it clearly could not assume that *all* route-by-route markets are identical, given their disparate costs and the wide variations in intermodal competition. In the interest of administrability, the Commission would need to modify its definition of the relevant geographic and product markets to facilitate efficient fact-finding, consonant with the wide variations in markets. For example, the Commission will need to consider fiber deployment costs for each relevant market, which vary tremendously on a geographic basis. Moreover, the Commission would need to account for significant variations in the number of business lines served by ILEC switches in different parts of the country. And to the extent the Commission finds that ILEC special access tariffs have a bearing on whether a CLEC is impaired, the Commission would have to consider the prices, terms, and conditions of special access that actually apply in any given relevant market — it could not, for example, find that CLECs are impaired in markets in Qwest's region based on the prices, terms, and conditions in the special access tariff of an ILEC other than Qwest.

possesses those relevant characteristics that permit a valid impairment finding and instead making a national "finding."[34] *USTA I* forbade just such an approach.

Likewise, the Commission cannot establish a national presumptive finding of impairment, without considering the facts concerning impairment at the more "granular" relevant market level. *USTA II* forbade that approach.[35] Any lawful impairment analysis must take into account the conditions at the relevant market level *before* making a finding as to whether impairment exists. And these rules cannot presume that the entire nation possesses sufficient similarity that a nationwide finding of impairment can be made, given the vastly different market characteristics that exist throughout the different geographic locations within the country.[36] Presuming impairment to exist nationally for all DS1s and for some arbitrary number of DS3s, and shifting the burden to the ILECs to overcome that presumption at the relevant market level does not comply with the statute, as interpreted in *USTA II, USTA I,* and *Iowa Utilities.*

B. *USTA II* Did Not Uphold, Affirm, or Endorse the FCC's National Impairment Findings or the Triggers Delegated to the States for Decision

AT&T and other commenters have suggested that the national impairment findings made in the *TRO* can be reinstated simply by converting the "triggers" that would have been consid-

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34 *USTA I,* 290 F.3d at 423.

35 In *USTA II,* the Court vacated the approach taken in the *TRO,* whereby there was a "provisional" national finding of impairment, with state-by-state consideration of the facts concerning particular markets, because the Commission did not have authority to delegate the fact-finding to states. It also, however, found that a national finding of impairment could not be sustained because the Commission had not examined the relevant facts at a granular level to determine whether impairment existed in the relevant markets. *See USTA II,* 359 F.3d at 564-71.

36 The same is not true with respect to non-impairment, however. Given that there is no impairment until the Commission makes a proper finding, there is a national presumption of non-impairment. Moreover, when the Commission makes "granular" impairment determinations, only those specific markets where the Commission finds impairment based on an evidentiary record are affected; the national presumption of non-impairment continues to govern all other markets.

ered by the states into criteria for FCC findings of non-impairment.[37] They claim that because the Court vacated the Commission's rules before reaching the issue of their validity, they somehow were sustained. This misstates the *USTA II* ruling.

The fact is that the Court did not consider the validity of the triggers at all. They were to be applied by the states, and the Court held that the states had no authority to do so. Any issue concerning the validity of the scheme that would have been applied at the state level became moot, and there was no need for the Court to address it. This is hardly an endorsement of the triggers, much less an affirmance.

The Court also did not uphold or endorse the FCC's national findings of impairment with respect to switching, high-capacity loops, or transport. With respect to switching, the Court said that, aside from the unlawful state delegation issue, it "doubt[ed] that the record supports a national impairment finding for mass market switching."[38] With respect to DS1, DS3, and dark fiber loops and transport,[39] the Court noted that the *TRO* "itself suggests that the Commission doubts a national impairment finding is justified on this record."[40]

Moreover, the *TRO* triggers were and are unlawful. The presence of one competitor in a market is sufficient to demonstrate the absence of natural monopoly characteristics in that mar-

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37 *E.g.*, AT&T Comments at 26-27; ALTS Comments at 35, 37-8, 75; MCI Comments at 126-7.

38 *USTA II*, 359 F.3d at 570.

39 AT&T claims that the Court left the Commission's decision as to loops undisturbed and "limited its criticisms of the provisional national impairment finding to those involving the 'unbundling of high-capacity transport facilities.'" AT&T Comments at 2 n.1. In fact, the Court expressly stated that its discussion of "dedicated transport elements" covered "transmission facilities dedicated to a single customer or carrier." 359 F.3d at 573. In other words, its vacatur of the Commission's impairment determination in this section of the opinion extended not only to what the FCC refers to as "dedicated transport" (*i.e.*, circuits between ILEC switches) but also to loops (*i.e.*, circuits used to reach customers). And its vacatur of the impairment determination was not expressly limited to dedicated transport; the Court "vacate[d] the national impairment findings with respect to DS1, DS3, and dark fiber." *Id.* at 574.

40 *USTA II*, 359 F.3d at 574.

ket, because if the market had natural monopoly characteristics with respect to the network element at issue, a second provider could not be sustained by definition. The unbundling standard does not give the Commission the flexibility to decide what a desirable level of competition might be in the abstract. It can only require unbundling when an efficient competitor would be impaired by the ILEC's failure to provide a given network element on an unbundled basis. The success of a single competitor disproves such impairment decisively. In addition, the route-by-route triggers unlawfully ignore the presence of special access and the presence of competition on other routes, which the *USTA II* Court held the Commission cannot deem irrelevant to its impairment determinations. Because the triggers did not comply with the legal standards set forth in *USTA II*, the Commission cannot simply adopt them as its measure of impairment.

C. Under *USTA II*, Intermodal Competition Cannot Be Ignored

The IXCs and CLECs claim that the intermodal competition from cable and fixed wireless can be ignored. Some say it "is so insignificant as an alternative to the incumbents' high capacity services that it should play no role in the impairment analysis."[41] Other carriers similarly claim that the Commission need not consider intermodal competition at all.[42] *USTA II* bluntly states otherwise: "[T]he Commission cannot ignore intermodal alternatives."[43]

As is the case with respect to other sources of competitive supply, the Commission must consider not only sources that are currently available, but those that have the realistic potential to serve as a competitive alternative within the reasonable future, especially if they have proven to

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41 AT&T Comments at 77; *accord* ALTS Comments at 40-45.

42 *See, e.g.* ALTS Comments at 52-3, 56-8 (suggesting that cable providers do not serve businesses, so the Commission should limit its exemption for DS1 unbundling to the residential market). As demonstrated in Section III, cable operators can, and do, serve business customers. Thus, ALTS' argument on this point must be rejected.

43 *USTA II*, 359 F.3d at 572-73.

be viable in other similar settings.[44] Cable and fixed wireless are both fully capable of providing intermodal competition to providers of high-capacity services as well as potential sources of DS1 and DS3 network elements. If these technologies are present in a service area, they offer an actual source of competitive supply. If they are not currently deployed with an architecture that permits immediate delivery of service to a given location, they offer a source of potential competition that is significant in any competitive analysis.

In Section III, we show that intermodal competition is a significant competitive force in Qwest's ILEC region, coming from cable operators, independent telephone companies expanding out of their service areas, and municipalities operating fiber networks provide substantial competition for ILECs for business customers in many small and large markets. The prevalence of these forms of intermodal competition across a wide variety of local markets in Qwest's territory shows that such entities have the ability to compete in any Qwest market.[45]

Such intermodal competitors are relevant in two ways: First, they demonstrate that an "efficient competitor" simply is not impaired. The fact that a less efficient competitor — for example, a competitor that chose not to construct a cable television system — does not have access to some network element required by its less efficient network architecture does not demonstrate impairment; rather, it demonstrates that an efficient competitor uses a different architecture. Second, the proven capability of intermodal competitors throughout Qwest's region is a factor that militates against unbundling even the Commission finds some competitors are "impaired" in

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[44] *See, e.g., USTA II*, 359 F.3d at 575 ("We do not see how the Commission can simply ignore facilities deployment along similar routes when assessing impairment. . . . [The Commission cannot] treat competition on one route as *irrelevant* to the existence of impairment on the other.") (emphasis in original).

[45] *USTA II* specifically requires the Commission to consider the existence of a competitive alternative in one area as evidence of the feasibility of competition in other similar areas. *See id.*

a given market; this is a factor weighing against unbundling pursuant to the Commission's "at a minimum" balancing process.

D. Under *USTA II*, the Existence and Successful Use of Tariffed Special Access is a Critical Factor in any Valid Impairment Analysis

1. The Court Held that the FCC Must Consider the Availability of Tariffed Special Access

The IXCs and CLECs claim that the Commission may "hold that the existence of special access is irrelevant to impairment determinations for landline services due to administrability issues."[46] This claim cannot be squared with *USTA II*. The fact that a carrier has purchased and is using a tariffed circuit to provide service simply cannot be ignored, given the critical reliance on such services by the *USTA II* Court in finding no impairment.[47] The Court was faced with an FCC order holding "that 'evidence that requesting carriers are using incumbent LEC tariffed services' is not 'relevant to [the] unbundling determination."[48] It concluded that "the Commission's impairment analysis *must* consider the availability of tariffed ILEC special access services when determining whether would-be entrants are impaired . . . . What the Commission may *not* do is *compare unbundling only to self-provisioning or third-party provisioning, arbitrarily excluding*

[46] AT&T Comments at 83; *see also, e.g.*, ALTS Comments at 9, 33-34.; MCI Comments at 162-165; Covad Comments at 81-84. ALTS and MCI suggest that Congress never intended for tariff offerings to eliminate the need for unbundling under Section 251. ALTS Comments at 9-11; MCI Comments at 127. Covad suggests that the statute does not require that the impairment analysis take into consideration alternate offerings of the network element in question from the RBOC. Covad Comments at 80-81.

[47] On the one hand, as is discussed in this section, the fact that carriers are successfully using special access in a given market precludes a finding of impairment in that market. *See USTA* II, 359 F.3d at 576. On the other hand, as is discussed infra at Section IV, under no circumstances can an existing tariffed circuit be "flipped" to a UNE rate, irrespective of the general state of the market.

[48] *USTA II*, 359 F.3d at 576 (citations omitted).

alternatives from the RBOCs."[49] By its terms, this decision does *not* permit the Commission to deem the existence of tariffed special access irrelevant, as some commenters claim.

Those opposing consideration of special access in the impairment determination also ignore another part of the decision that addressed how tariffed special access must be considered. In discussing EELs (extended enhanced links, which are combinations of UNEs), the Court addressed the effect of the current use of special access by competitive providers of service on determining whether those particular providers are impaired. It found their use of tariffed special access circuits to be dispositive evidence that they were not impaired, and therefore could not convert their existing special access facilities to UNEs. Their successful use of "critical ILEC facilities," obtained pursuant to special access tariffs, in a competitive service "precludes a finding that the CLECs are 'impaired' by lack of access to the element under § 251(c)(3)."[50] Far from allowing the Commission to deem special access usage irrelevant, the Court held it to be dispositive, *precluding* an impairment finding.

The claim that the Commission can ignore special access on "administrability" grounds[51] is mistaken. The Court held that the Commission had the right to consider "factors such as administrability" in its analysis of how the availability of special access affects the impairment determination, but it specifically held that the Commission could not deem the successful use of tariffed special access circuits in a competitive service to be irrelevant to impairment.[52]

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49 *USTA II*, 359 F.3d at 577 (emphasis added).

50 *USTA II*, 359 F.3d at 593 (emphasis omitted).

51 AT&T Comments at 84, 85; *see also* Loop and Transport CLEC Coalition Comments at 66.

52 *USTA II*, 359 F.3d at 577.

Moreover, AT&T misstates how the Court raised the issue of "administrability" in its opinion. AT&T claims that "attempts by the Commission to determine the viability of retail competitive carrier services" using special access would raise "administrability" issues that would allow it to ignore the availability of special access altogether.[53] In fact, the court mentioned "administrability" as being a potential issue only in the hypothetical event the Commission adopted a rule that exempted from unbundling any service offered at lower than TELRIC prices and ILECs were then able to "drastically hike those rates."[54] No such situation is posed here.

2. The "Price Squeeze" Claims Fall Flat

AT&T and others claim that ILECs have priced special access too high.[55] While they make no specific, supported allegations about Qwest's special access prices, their general argument is that special access is priced so far above cost that, coupled with the ability of ILECs to combine above-cost special access with below-cost long distance services, ILECs are able to enact what is known as a "price squeeze."[56] Yet the evidence submitted by AT&T and other CLECs in this docket demonstrates that special access is not priced unreasonably — AT&T and other CLECs have submitted evidence that, if they built the very same facilities, it would cost them more than the ILEC special access rates. There is no indication why ILECs would incur

53 AT&T Comments at 84.

54 *USTA II*, 359 F.3d at 576.

55 *See, e.g.*, AT&T Comments at 80-115; ALTS Comments at 11-12; Covad Comments at 84-87, 90.

56 A price squeeze is an antitrust term that describes a situation where a monopolist in the provision of a product that is an input to a competitive retail product (which the monopolist also provides) prices the wholesale product with a high margin, and the retail product with a low margin, making up losses in the retail product by way of overall firm profits.

significantly lower costs to build the same facilities — indeed, AT&T admits that ILEC and CLEC costs for construction are identical.[57]

The problem with the price squeeze theory is that, even if there were a cost disparity that could justify a finding of price squeeze, the theory assumes that the FCC either cannot or will not carry out its statutory responsibilities — specifically, enforcement of Section 201(b)'s requirement that prices be "just and reasonable"[58] and Section 254(k)'s requirement that a carrier "not use services that are not competitive to subsidize services that are subject to competition."[59] AT&T's argument assumes that the Commission either cannot, or will not, enforce these statutory provisions. The Commission, however, is fully capable of doing so. It has held, for example, that a tariff that results in a price squeeze would be unlawful,[60] and it has rejected tariffs based on price squeeze allegations.[61]

To the extent the Commission has evidence that particular special access rates are unjustifiably high, or result in a price squeeze, it should address the issue directly in a proceeding to consider those rates. It should not take the drastic step of requiring unbundling — especially given the open-ended, nonspecific allegations presented here — in light of its obligation to con-

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57 AT&T Comments, Att. D at 19 n.9.

58 47 U.S.C. § 201(b).

59 47 U.S.C. § 254(k). Price squeezes are most often accomplished in a regulated industry by misallocation of joint and common costs. Section 254(k) gives the FCC the specific directive to prevent cross-subsidization by adopting "any necessary cost allocation rules, accounting safeguards, and guidelines to ensure that services included in the definition of universal service bear no more than a reasonable share of the joint and common costs of facilities used to provide those services."

60 *See GTE Telephone Operating Companies*, 13 F.C.C.R. 22466, 22483 (1998) ("This Commission is well-versed in addressing the price squeeze concerns of new entrants and has in the past successfully forestalled attempts by incumbent LECs to shift costs to monopoly services in order to justify rates that effect a price squeeze. We have ample authority under the Act to conduct an investigation to determine whether rates for DSL services are just and reasonable.") (footnotes omitted).

61 *See Local Exchange Carriers' Rates, Terms and Conditions for Expanded Interconnection through Virtual Collocation*, 10 F.C.C.R. 6375, 6401, 6403 (1995).

sider less drastic alternatives to unbundling.[62] It certainly cannot order unbundling as a surrogate for its failure to carry out its statutory obligation to ensure that interstate rates are just and reasonable.

II. COMPETING CARRIERS ARE NOT IMPAIRED WITH RESPECT TO HIGH-CAPACITY LOOPS AND TRANSPORT

Cost disparities not tied to natural monopoly advantages of the ILEC are not a basis for finding impairment. With regard to high capacity loops and transport, the IXCs' and CLECs' claims of impairment amount to little more than the assertion that it would cost them more to construct new fiber optic loops or transport facilities than they would be able to generate in immediate revenue, at traffic levels below some threshold number of DS3s. These cost shortfalls are due only to the fact that costs are higher at the initial stage of providing service, not any ILEC monopoly advantages. The competing carriers' attempts to pin their cost/revenue shortfalls on ILEC monopoly advantages beg the question by falsely assuming, without even attempting to substantiate, that ILECs have insuperable natural monopoly advantages. Without showing that the ILEC in fact has natural monopoly advantages, there can be no basis for an impairment finding. Moreover, their analyses grossly inflate the cost of competing by ignoring any number of cheaper alternatives to digging trenches and installing buried conduit for new fiber deployment. As a result, if the Commission adopts their rationale, any resulting unbundling rules will face the prospect of yet a fourth judicial *vacatur*.

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62 *See USTA II*, 359 F.3d at 563.

A. AT&T's Natural Monopoly Position Is Erroneous and Misleading

AT&T and other IXCs and CLECs give lip service to the fact that the Act permits an impairment finding only when competition would be impaired without access to a requested unbundled network element because of the natural monopoly characteristics of the element within the relevant product and geographic market.[63] In fact, a proper focus on natural monopoly would permit the Commission to adopt rules that implement the 1996 Act.

A natural monopoly is, of course, one in which the economies of scale and scope of a single provider extend over the full range of demand, making the market unsuited for competitive supply — and one of the chief assumptions of the 1996 Act was that local exchange services were *not* natural monopolies, because there would have been no reason to open the local exchange to competition if it were a natural monopoly, unsuited to competition.[64] Thus, under the law, statutory impairment can be found only when the ILEC's economies of scale and scope resulting from its former legal monopoly status continue to extend over the entire range of the market for a given network element, such that the network element has natural monopoly characteristics. Many of the structural and operational barriers to competitive supply that previously gave the ILEC natural monopoly characteristics were ended, however, because the statute gives competitors access to the ILEC's poles, ducts, conduits, and rights of way, allows them to collocate in the ILEC's central office, and requires the ILEC to interconnect with them, among other things.[65]

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63 *See, e.g.,* AT&T Comments at 4, 9, 14; ALTS Comments at 6-7; Loop and Transport CLEC Coalition Comments at 22-24.

64 *Cf. USTA II,* 539 F.3d at 571-72.

65 *See* 47 U.S.C. § 251(b)(4), (c)(2), and (c)(6).

AT&T now claims that the "market" for high capacity loops and transport is in fact a natural monopoly and that IXCs and CLECs accordingly should be permitted to purchase these facilities at TELRIC prices rather than at the tariffed rates at which they are currently offered by the ILECs.[66] AT&T's argument is too smart by half. Fundamentally, AT&T claims that its costs for constructing high capacity loops or transport (at limited capacity) are dramatically higher than the special access tariff rates at which it could lease the facilities today, while at the same time it concedes that the ILEC's actual costs of constructing the same facilities are the same as AT&T's.[67]

AT&T's claim of impairment is not based on any difference in cost, but rather on the fantasy that every ILEC already has a "ubiquitous" fiber optic network in place, constructed in the pre-1996 monopoly days, that is capable of providing high-capacity services without limit to businesses everywhere in its territory. For reasons that cannot be explained, AT&T argues it costs the ILEC practically nothing to serve a customer, while it would be extremely expensive for CLECs to undertake the same task and construct the same facilities.[68] In this hypothetical network the ILEC's facilities reach all buildings that might need service using high capacity loops and provide the ILECs with enough spare fiber in those facilities to provide service to new

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66 *See* AT&T Comments at 13, 22-80; *see also* Loop And Transport CLEC Coalition Comments at 40; Comp-Tel/Ascent Comments at 16-21.

67 AT&T states that "[i]nvestment for the competitor is . . . roughly equivalent to an ILEC's if the ILEC requires new construction." AT&T Comments, Att. D at 19 n.9.

68 AT&T Comments, Att. D at 17 ("The ILECs historically were protected monopolists that were guaranteed the ability to serve all demand in their franchised territories. As a result, they were permitted — indeed encouraged if not required by the regulatory regime — to construct a ubiquitous network consisting of fiber facilities connecting their wire centers to each other and fiber loop feeder plant reaching deep into many neighborhoods. Today, at least the RBOCs connect each and every wire center (LSO) with fiber and have fiber extended to virtually every enterprise customer location of any size. This was possible because their monopoly status assured them of both high demand and access to capital.").

customers at practically no incremental cost.[69] In fact, as discussed in Section II.B below, much of the fiber that ILECs have in place was not laid in a monopoly environment; it was put in place after the 1996 Act ended any legally protected monopoly, and the ILECs continue to deploy fiber today, incurring the same costs that AT&T would incur to do so, with no natural monopoly advantages at all.

B. AT&T's "Business Case" Analysis Is Predicated on Invalid Assumptions

AT&T's claim of impairment for fewer than three DS3 loops or 13 DS3s of transport is based on a comparison between the revenue that will be generated by committed customer demand at a given location (or its own current demand for transport) between two ILEC switches and AT&T's inflated estimate of the cost of constructing new fiber optic facilities to serve that demand.[70]

AT&T bases its impairment argument on an alleged "business plan" or "business case" analysis[71] that would not be adopted by any rational competitor. If AT&T can be believed, it will never invest in facilities until after a customer has actually committed to a service contract; it will never consider a customer's growth needs or the revenue that could be obtained from other potential customers in a building or building complex to which it is considering constructing a circuit (even if the vast majority of the potential customers' existing business lines and potential growth could be accommodated); it will never reuse or sell for salvage value functional and fun-

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[69] AT&T Comments, Att. D at 17-18 ("Now that this fiber infrastructure is already in place — and close to virtually every customer location (whether wholesale or retail) — incremental increases to the ILECs' capacity and reach can be made at extraordinarily low incremental costs compared to those faced by any competitor.").

[70] AT&T Comments at 27; *id.*, Att. C (Dapolito-Stanley Declaration) at 6, 8, 12-16; *id.*, Att. D (Fea-Giovannucci Declaration) at 17; *see also* Loop and Transport CLEC Coalition Comments at 79-81.

[71] *See generally* AT&T Comments at xiv, 11, 27, 30, 34-37, 44, 57, 58, 63, 69, 109.

gible equipment; and all of its costs must be recovered within the initial contract term. Each customer contract, if AT&T's comments can be believed, is considered as a stand-alone business proposition.

Of course, no rational company engages in business on these terms. A rational company does not decide whether to install costly fiber optic facilities to a particular location based solely on whether the costs of deploying facilities with a 25-year life will be fully covered by the revenues of a single customer's current requirements over the course of three to six years, without any consideration of any other revenues that could be derived from them. AT&T is "impeded," if at all, not by "natural monopoly" characteristics of the ILEC but by its own purported business plan.

1. AT&T Invalidly Assumes that the ILEC Has a Ubiquitous Fiber Network that Constitutes a Natural Monopoly

AT&T's most fundamental argument is that its own costs for high capacity loops and transport exceed the ILEC special access prices. AT&T concludes that this cost disparity results from a natural monopoly situation because the ILECs' economies of scale extend over the full range of demand, primarily because the ILEC network is assertedly in place and readily expandable with minimal additional costs.[72] AT&T's impairment analysis is entirely dependent on the proclaimed existence of a ubiquitous ILEC fiber network constructed and paid for during the monopoly era (i.e., pre-1996).[73] Given this assumed ILEC advantage, AT&T argues, a CLEC can compete only if the amount of traffic it is certain to generate exceeds the high cost of digging

[72] *See, e.g.,* AT&T Comments, Att. D at 17-19.

[73] *Id.; see also* AT&T Comments at 8-9.

up city streets and putting in new conduit and fiber for an individual customer.[74] AT&T then claims that the cost of outside plant construction that it assumes will be necessary to compete with the ILEC, which it assumes has a ubiquitous fiber network, poses a structural barrier to competitive supply.[75] As we show, each of the assumptions in AT&T's analysis is incorrect.

AT&T claims that the proper measure of the cost differential to determine natural monopoly is whether a CLEC's actual cost to self-provision a given level of loops or transport is covered by the committed revenue expected from that level of facilities covered by an individual contract, capped at 90% of the ILEC's special access rate for equivalent facilities.[76] This analysis, however, is inherently flawed not only by the fallacious business assumptions it relies on, but because it assumes that in every case the ILEC can serve the customer at little or no cost by means of its supposedly ubiquitous fiber optic network built before competition existed (and apparently built without cost).

AT&T argues that the existence of the hypothetical ubiquitous network of monopoly-era fiber is the key to the ILEC's natural monopoly advantages — thus premising its natural monopoly conclusion on the assumption that there is a natural monopoly advantage. AT&T claims:

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[74] AT&T Comments at 34; *id.*, Ex. C at 9-10 ("Virtually all loop deployment requires the placement of new outside plant (conduit and fiber) that connects a pre-designed access point on pre-existing AT&T metro fiber to the customer's location.")

[75] AT&T Comments, Att. C at 16 ("[T]he high sensitivity of business cases to the length and cost of outside plant highlights the incumbents' enormous advantages that result from their widely deployed fiber facilities. The incumbent's widely deployed fiber facilities — an investment for which the incumbents are seeking further protective sanctions from this Commission — create a significant competitive barrier for CLECs, even where they are seeking to serve a customer that requires more than 2 DS3s of capacity.").

[76] AT&T Comments, Att. C at 12-13 ("In order to justify construction (and thus devote the necessary capital), AT&T identifies all new revenues and/or access savings to which the customer would be willing to commit. . . . For the purpose of this Commission's limiting rule, however, the question is how many DS3s are necessary to justify a build. To make this assessment, a typical unit revenue for DS3s committed to by enterprise customers must be established. One method to accomplish that is to examine what a special access configuration might cost if it were bought under a multiyear commitment. . . . [A] CLEC would generally need to price about 10% below the ILEC to win the business . . . .").

> [T]he Bells . . . have extended fiber to virtually every enterprise customer location of any size, and this fiber has substantial excess capacity, because these fiber cables were rationally deployed with numerous spare strands. . . . Now that the incumbents' fiber infrastructure is already in place — and close to virtually every customer location (whether wholesale or retail) — incremental increases to the incumbent's capacity and reach can be made at extraordinarily low incremental costs compared to those faced by any competitor.[77]

AT&T never demonstrates that this ubiquitous, no-incremental-cost fiber optic network actually exists, however. And its existence is belied by the fact that AT&T itself has repeatedly sought to hamper recent ILEC efforts to build out their fiber optic networks. AT&T's claim that the ILECs have access to unlimited monopoly-era fiber is inconsistent with AT&T's TELRIC advocacy over the past eight years, in which AT&T claimed that ILECs constructing *new* fiber in the *post-monopoly era* were required to assume only sufficient fiber to meet the existing demand for current ILEC high capacity customers (which would preclude the assumption of spare capacity that AT&T bases its entire analysis on).[78] AT&T, in other words, not only tries to prove an ILEC monopoly by assuming an ILEC monopoly, but also has sought to prevent ILECs from building out rational non-monopoly networks in the post-monopoly era.

There are two major problems with AT&T's assumption that the ILEC has a ubiquitous monopoly era fiber network, at least in the case of Qwest:

- Qwest, the ILEC, does *not* have ubiquitous fiber to virtually all its enterprise customers and *does* construct new conduit facilities on an ongoing basis; and

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[77] AT&T Comments at 31; *see id*, Att. D at 17-18.

[78] AT&T also assumes (*sub silentio* because it fails to mention this at all) that the poles, ducts, and conduits that support this network contain no space for exercise of AT&T's statutorily guaranteed access rights. Incredibly, AT&T contends that it will need to construct new underground conduit whenever it seeks to serve a new customer, falsely implying that it will never be able to use the conduit of the ILEC. In reality, many of the assumptions underlying TELRIC do not match reality. As a result, the ILEC's actual costs are much higher than TELRIC and AT&T's comparisons between its purported costs of construction and TELRIC are utterly meaningless.

- If Qwest did have facilities to all enterprise customers, AT&T would have access to conduit serving these customers and not face construction costs, offsetting any natural monopoly advantage that Qwest might otherwise have.

Qwest does need to construct facilities to reach customers with fiber. In the years 2000 through 2003, Qwest has built nearly [redacted] trench feet of underground conduit structure in its ILEC operations and continues to build conduit structures in 2004. The construction costs for Qwest's conduit structure range from [redacted] per foot to [redacted] per foot. In the same time period Qwest has placed nearly [redacted] sheath feet of fiber cable (*i.e.*, underground fiber cable) in its ILEC operations. Additionally, the cost of the underground fiber cable itself ranges from [redacted] per sheath foot down to [redacted] per sheath foot. Clearly, if Qwest had facilities to reach all the enterprise customers, it would not have invested [redacted] to extend its underground fiber network. Qwest in fact faces similar construction costs to those described by AT&T when population densities are taken into account.[79] The fact is that Qwest, like AT&T, reaches customers through a mixture of existing and new facilities.

The foregoing facts make it clear that Qwest does not have fiber facilities to all enterprise customers, but if one follows AT&T's assumption that Qwest *does* have spare fiber available to all the enterprise locations, it logically follows that Qwest would have spare conduit and/or spare innerduct to some or all of these locations. Innerduct provides sufficient space to place fiber cables capable of serving all the fiber of needs of individual buildings. The average price for innerduct in Qwest's 14 state SGATs is $0.31 per foot per year (less than $0.03 per month) which is *less than one fifteenth the monthly cost of constructing the same facility*. Thus, a major inconsistency in AT&T's analysis is that it assumes new construction 100% of the time, when its own

[79] *See, e.g., AT&T Ex Parte*, Ex. A at 2. AT&T's analysis does demonstrate that the TELRIC methodology is flawed.

assumptions show alternatives are available at a fraction of the cost, even when the cost of the actual fiber optic cable and deployment in the existing innerduct is taken into account. Reality affirms AT&T's inconsistent assumptions that ignore the availability of leased conduit space: AT&T leases [redacted] feet of conduit from Qwest for its local operations.

Another flaw in AT&T's argument is its assumption that an ILEC has essentially infinite excess capacity available wherever it has fiber in place. Obviously, intelligent engineering and design call for installation of spare capacity whenever fiber or copper is installed in a particular location, especially if that installation entails digging up streets or trenching. Intelligent engineering, however, does not include installing unlimited spare capacity in every location, and Qwest, when installing high capacity loops and transport attempts to balance between current needs and reasonably foreseeable future needs.

In short, there is simply no evidence that ILEC existing spare fiber capacity presents any of the indicia of a natural monopoly. The bottom line here is that AT&T is jumbling together a number of unrelated cost and economic concepts which neither relate to each other nor prove AT&T's point.

2. AT&T Invalidly Ignores Potential Revenue from the Entire Extent of the Market

A comparison of the cost of new fiber optic facility construction or the cost of a special access service against the expected revenue from committed demand, has no relevance to a determination of impairment. Any such comparison looks only to whether the cost of construction is lower than the expected short-term revenue initially expected, or the short-term cost of the special access alternative, considering only the current demand from a single customer, whether

an end user or another carrier. It ignores the total potential demand that could be accommodated by the facility, including growth in demand from the initial customer and demand of other customers that could be accommodated, as well.

AT&T expressly excludes potential revenue from its analysis, going so far as to exclude potential revenues within the same building or building complex in evaluating the economics of constructing a high capacity loop to that building, and it likewise excludes all potential efficiencies and economies of scale that could be gained from deploying facilities based on this potential.[80] AT&T is quite candid about this position: "AT&T and other CLECs cannot (and AT&T does not) make construction plans based on revenues they 'might' earn from other customers — or even the same customer — at the same location."[81] Instead, it states, "each business case must be based on the specific, *committed* revenues made by the individual customer under each individual contract proposal," and "any consideration of 'total potential building revenues' is an irrelevant exercise — it has no pertinence to our decision as to whether or not a fiber extension to a building exists, or whether or not one can economically be built to serve the location."[82] This analysis has no relevance to whether an ILEC special access network is a natural monopoly.

In fact, AT&T's whole premise is that the special access market is a natural monopoly because it may be more expensive for AT&T to construct some lines than it would be for an incumbent, and AT&T claims that, on that account, it can only construct based on committed reve-

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[80] Other CLECs make these same mistakes. *See, e.g.*, ALTS Comments at 63 (ignoring the potential revenues from additional customers in a building), 64-5 (suggesting that the analysis should be specific to the end user location), and 88 (suggesting that the costs associated with a loop facility in an EEL is specific to the particular customer); MCI Comments at 134 (stating the loops and transport, once built, cannot be redployed to serve other routes); *see also* Loop and Transport CLEC Coalition Comments at 99.

[81] AT&T Comments, Att. C at 6.

[82] *Id.* at 6-7.

nue and not intelligent business and market planning. But *USTA I* makes clear that AT&T's analysis is not a legitimate measure of impairment. AT&T does not, because it cannot, explain how its exclusion of revenue that is not guaranteed by a pre-existing contract is somehow related to the incumbent's "natural monopoly" advantages. This approach was expressly ruled out by the Court, which criticized the Commission's reliance on a comparison of the costs and revenues associated with providing services "in the early stages of entry," because "average unit costs are necessarily higher at the outset for any new entrant into virtually any business."[83] Instead, the Court said, any analysis of a competitor's costs must be "focused on the presence of economies of scale '*over the entire extent of the market.*' . . . Without a link to this sort of cost disparity, there is no particular reason to think that the element is one for which multiple, competitive supply is unsuitable."[84]

What this means is that any legitimate analysis of a competitor's costs and revenues must take into account the full range of services that could be provided to all of the customers that could be served by a given facility (or a reasonable subset of such customers as would be shown by the market studies of the CLEC).[85] Suitability for competition is based on all potential revenues that can be generated over a facility, not just the revenues of the initial customers signed up (who, incidentally, under AT&T's analysis, would need to wait many months for service after

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83 *USTA I*, 290 F.3d at 427.

84 *Id.* (emphasis in original; citations omitted).

85 AT&T acknowledges that it often adds DS1 and DS3 circuits to buildings that are already served by its fiber facilities: "Virtually all of AT&T's self-supplied DS1 and DS3 loops are used to serve customers in locations where AT&T has *already* built *higher* capacity facilities and where those same customers have a variety of needs (including a need for smaller capacity services.)" AT&T Comments at 42. Nevertheless, AT&T's cost analysis does not take into account the potential future demand for services that might be provided over a given facility. Moreover, it considers only the cost of new facility construction. As a result, its cost analysis does not take into account the fact that "virtually all" of the DS1 and DS3 circuits it self-provisions entail no incremental construction costs at all.

signing the contract because of AT&T's refusal to construct until after the customer has committed itself to a specific revenue level). In analyzing the economic feasibility of deploying a fiber optic circuit that has far more capacity than the customer needs, it is not proper to consider only the committed revenue from that customer and declare the facility to have natural monopoly characteristics because the cost exceeds the initial committed revenue.

To determine whether such a facility is economically feasible as a competitive alternative to the ILEC, it is necessary to consider all revenue that could reasonably be derived from the facility. This includes revenue attributable to the initial customer's committed demand, potential growth in that customer's demand over the life of the facility, and potential traffic from other customers that could be carried over the same facility. Moreover, any such analysis must include traffic currently carried by the ILEC or other CLECs for which the newcomer could compete over the long term if the facility were built (*i.e.*, the entire extent of the "market," if the Commission were to deem each route a separate relevant market, which we submit *USTA II* precludes). The revenue opportunity must also include all potential revenue from all services using the high capacity loop as an input, not just the revenues to be derived from reselling the high capacity loop itself. In other words, even though the revenue from a customer wanting a single DS1 and purchasing no other related services might be insufficient to cover the cost of a fiber loop, laying the fiber may nevertheless be economically justifiable if the total projected long-term demand for high-capacity services and ancillary services from that customer and all others in the same building or complex could sustain the cost of construction,[86] or if the market itself as a whole offered

[86] AT&T compounds its violation of this fundamental precept when it establishes a revenue cap of 90% of special access rates. This cap understates potential revenues because customers will likely buy a full range of services that can be provided by dedicated facilities including public switched network services, data services such as
(footnote continued)

sufficient revenue potential to warrant construction even if revenue from a specific route may not be profitable if viewed in isolation.

This is Business 101: Just as Ford Motor Company does not judge whether building an automobile assembly plant will be economically justified by comparing the cost of construction against the revenue from a single dealer's committed orders, one cannot decide whether constructing a telecommunications facility will be economically justified by comparing the cost of construction against the revenue from selling only the capacity initially committed. Ford does not have a natural monopoly, but it can reasonably estimate that it will be able to sell cars to a certain percentage of potential customers, and sizes its plant construction on that basis. By AT&T's logic, virtually every business venture would constitute a natural monopoly. The economic viability of a planned business venture or telecommunications facility must be measured by comparing its cost against its total market revenue potential.

An efficient provider installing a facility would have every incentive to attempt to win the business of all of the customers the facility could serve, and would need to construct sufficient facilities to enable it to serve a reasonable projected share of the market. If such a provider succeeded in winning the amount business on which it based its market plan, it could have a profitable facility over time, which is the key to the "natural monopoly" inquiry: If an entrant built an alternative facility efficiently, would there be a net benefit to consumers due to the resulting facilities-based competition, or, alternatively, are the cost and structural advantages of the ILEC

(footnote continued)
ATM, Frame Relay, *etc.* Treating the revenues as purely point-to-point-private line understates the revenue potential that AT&T will realize from the connection to the end user. AT&T states that their typical approved business case contains committed revenue far beyond that implicit in only one or two DS3s. AT&T Comments, Ex. C at 12. It is obvious that a real business case includes all of the likely revenue associated with a project.

such that a competing facility would inevitably be "wastefully duplicative" of the ILEC's facilities, doomed to economic failure and incapable of producing any benefit to consumers?

AT&T's focus on whether the short-term revenue potential of a given facility exceeds the cost of the facility renders its analysis irrelevant to a determination whether any given network element is inherently one for which "multiple, competitive supply is unsuitable."[87] By attributing all of the costs of the facility to the initial level of service demanded by a single customer, AT&T artificially drives up the purported cost of service, making deployment appear economically infeasible, and in doing so violates basic economic principles and the approach required by *USTA I*.

In short, AT&T's "business plan" on which it relies to show "impairment" is so unrealistic that no sane business would ever implement it in any market, and it does not have any connection to a determination whether AT&T is impaired due to the natural monopoly characteristics of a given communications link. Still worse, as is documented below, AT&T has grossly exaggerated the relevant costs of entering the market.

3. AT&T Invalidly Assumes the Cost of Underground Conduit Construction in All Cases, Instead of Less Expensive Alternatives, Such as Using Existing Conduit, Copper Loop UNEs, or Other Carriers' Facilities

AT&T's business case analysis makes the unwarranted assumption that to serve any given customer with DS1 or DS3 loops, it will always have to engage in outside plant construction of the most expensive kind, namely the construction of underground conduit structures,

87 *USTA I*, 290 F.3d at 427.

without any opportunity for leasing already-constructed conduit from an ILEC or other carrier, or using other less expensive alternatives. AT&T states:

> Virtually all loop deployment requires the placement of new outside plant (conduit and fiber) that connects a pre-designed access point on pre-existing AT&T metro fiber to the customer's location. In the vast majority of cases, the competitive carrier must extend a fiber lateral to the location in an underground conduit. The conduit is by far the most expensive aspect of outside plant cost. The conduit cost is driven by the cost of opening a trench, placing and stabilizing the conduit, and then closing the trench. . . . [F]or purposes of this analysis AT&T is using the publicly available HAI figure of $125,000 per mile, which is very close to AT&T's own observed costs.[88]

In AT&T's computation of the costs of serving a customer, it assumes the most expensive alternative, underground conduit, rather than the less expensive alternatives of buried cable or pole-mounted aerial cable, and it also never uses the cost of installing its fiber in existing conduits or other structures belonging to other carriers. It also uses cost figures for the most expensive locations for outside plant construction — high-population-density areas.

AT&T acknowledges that the cost of outside plant deployment is "heavily influenced by whether fiber is pulled through an empty duct in existing conduit or whether an entirely new conduit must be deployed," noting that when it uses another party's conduit it must pay a fee.[89]

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[88] AT&T Comments at 34-35; *id.*, Ex. C at 9-10; *see also AT&T Ex Parte*, Ex. A at 4 (weighted average of the total installed cost for aerial, buried, and underground fiber optic cable of 30.34 per foot, or $160,195 per mile, based on HAI inputs). AT&T's assumption of $125,000 per mile is based on the midpoint of data from two density zones in the HM5.3 TELRIC model plus the assumption that the fiber cable is approximately $7000 per mile (AT&T Comments, Att. C at 11-12, n. 9). This yields a per-foot cost of $23.31 per foot. In the TELRIC dockets AT&T advocates a far different average conduit placing cost. In the Washington cost docket the conduit placing costs ranged from $10.29 to $75.00. The weighted average, after sharing, advocated by AT&T for use in the pricing of UNEs was $5.94 per foot (not including cable). The reference to "HAI" refers to "the model formerly known as the Hatfield model," and Hatfield Associates, the provider of the Hatfield model, is now known as HAI Consulting, Inc. According to its website, HAI produces the publicly accessible "HAI model" for AT&T and MCI. *See* <http://www.hainc.com/hmdescr.pdf> at § 1.1 & n.1.

[89] AT&T Comments, Att.. C at 11 & n.8.

Inexplicably, however, AT&T's cost estimates are based on underground conduit construction, without any consideration of the lower-cost alternative of running its fiber through the ILECs' "ubiquitous"[90] conduits (or, for that matter, other CLECs' conduits), to which it is entitled access by Section 251(b)(4).[91] AT&T does not even mention the statutory availability of the ILECs' conduits, much less explain why a CLEC would universally opt to construct new conduit at enormous cost (and the attendant delays).[92] Given this omission, AT&T's cost estimate for new fiber facilities is grossly in excess of the cost entailed by a carrier utilizing an efficient network architecture.

AT&T produced estimates of the cost of constructing fiber outside plant using different techniques in areas of various population densities in a 2002 *ex parte* that illustrate the magnitude of its current distortion of the cost of deploying fiber. There, it used the "Hatfield Model" input cost estimates that the construction cost for lines strung on aerial poles is $2.78 per foot ($14,678 per mile) regardless of population density; the cost of excavation, installation, and renovation for buried cable ranges from $1.77 to $45.00 per foot ($9345 to $237,600 per mile), depending on population density; and the cost of excavation, installation, and renovation for underground cable conduit structures ranges from $10.29 to $75.00 per foot ($54,331 to $396,000 per mile).[93] Neither AT&T nor its contractor supply an estimated cost of leasing conduit, but it

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90 AT&T Comments, Att.. D at 17.

91 47 U.S.C. § 251(b)(4).

92 ALTS' comments reflect this same assumption, suggesting that often there is not sufficient collocation or conduit space available for a CLEC. ALTS Comments at 65. In practice AT&T does not follow these assumptions in its advocacy, and makes vast use of ILEC conduit space. In the Qwest territory alone AT&T purchases [redacted] of conduit space, as discussed below.

93 *AT&T Ex Parte*, Ex. A at 1-2. These costs are unchanged in the version of the Hatfield Model currently available on AT&T's contractor's website. *See* HAI Consulting, Inc., *HAI Model Release 5.0a, Inputs Portfolio*, available at <http://www.hainc.com/hminputs.pdf> ("HAI Inputs").

typically rents for a few cents per foot per month.[94] Obviously, AT&T's $125,000 estimated cost per mile for constructing the facilities needed to provide loops or transport grossly overstates the likely cost in the vast majority of cases.

Qwest's own statistics document the extent of the AT&T misanalysis on this issue. AT&T currently leases [redacted] feet of conduit space from Qwest. AT&T claims that it costs $22.35 to construct conduit, which translates into approximately $4.68 per foot per year of cost. Conduit such as that AT&T leases from Qwest is available to CLECs at SGAT prices between $0.19 and $0.35 per foot per year (*i.e.*, about $0.015 to $0.03 per foot per month), less than one fifteenth of the cost estimated by AT&T. This is not a minor arithmetical error. AT&T's refusal to include the availability of ILEC conduit as a statutory right undermines AT&T's entire analysis.

Never addressed in AT&T's comments is the fact that fiber optic facilities are not necessary to deploy DS1 loops in the first place. There are a variety of technologies that are available and in wide use to provide DS1 loops via copper loops available as UNEs using various types of HDSL (high data rate digital subscriber line) technology.[95] For example, a CLEC can use a two-wire copper loop to provide DS1 service to a customer located as far as 10,000 feet from an ILEC central office using HDSL2 technology. A CLEC can also use a four-wire copper loop to provide DS1 service to the end use customer located up to 11,000 feet from the ILEC central office using HDSL technology, or up to 14,000 feet using HDSL4 technology. In addition, a

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[94] The average price for leased use of innerduct specified in Qwest's SGATs is $0.31 per foot per year, or less than three cents per month.

[95] See Attachment 2, Declaration of David Teitzel and Barry Orrel (Teitzel/Orrel Declaration) at 12-14, paras. 20-23; s*ee e.g.*,ADC Telecomm, *HDSL Basics*, <http://www.arcelect.com/High-bit-rate_Digital_Subscriber_Line-HDSL.htm>

CLEC can use two two-wire copper loops to deliver DS1 service using HDSL or HDSL4 technology at similar distances. HDSL technology is readily available in the marketplace from vendors such as Cisco.[96] These facilities require only an unbundled copper loop (if AT&T desires to purchase from the ILEC), not an unbundled DS1. The failure of parties such as AT&T to address a readily available alternative to fiber optic deployment for provisioning DS1s demonstrates their failure to show they are impaired.

AT&T's cost analysis assumes that a given carrier will have to construct new fiber optic facilities to accommodate its own demand for DS1 and DS3 loops or transport, ignoring entirely the fact that another carrier may have such plant in place that could be used to serve AT&T's needs, in cases where AT&T does not have facilities present.[97] AT&T asserts that "[t]he fact that *another* carrier has built a facility to a given [ILEC switch] or to a given customer location has nothing whatsoever to do with whether AT&T can economically build a transmission facility between the same two points."[98] To the contrary, the fact that another competitive carrier has an alternative fiber facility in place has *everything* to do with determining whether the market is suitable for competition and whether the market in which that fiber is used to provide competitive services is a natural monopoly or suitable for competition. AT&T's approach also manages to abstract away the presence of competition in a market, in violation of *USTA I*.

The issue is not whether one particular competitor, with its own unique business plans, might find market entry difficult because other competitors make entry difficult, but rather

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96 *See* Cisco Systems, Inc., *HDSL Introduction*, <http://www.cisco.com/en/US/tech/tk175/tk318/tech_protocol_family_home.html>.

97 ALTS also minimizes the existence of competitive fiber facilities, stating that even the requirement to channelize digital circuits over optical facilities to use a competitor's SONET ring is too burdensome. ALTS Comments at 63.

98 AT&T Comments, Att. D at 21 (emphasis in original).

whether a competitor with "the most efficient network architecture" will be impaired by the natural monopoly characteristics of the market.[99] Obviously, there is some point where the addition of one more competitor may not be economically feasible, but that fact is not evidence of a natural monopoly; it is evidence of competitive saturation.[100] In the case where other more efficient competitors have entered the market in advance of a given CLEC, the other carriers' presence and the CLEC's inability to compete simply proves the CLEC's inefficiency, not that the ILEC has a natural monopoly. The most efficient competitor, in this case, is one who can take advantage of the fiber already in place, because such a competitor can add any number of DS1s or DS3s, small or large, at little or no incremental cost,[101] with no need for UNEs. If a carrier other than AT&T has the fiber in place and AT&T is either unwilling or unable to use it, then AT&T is not the efficient competitor with whom the impairment analysis is concerned.[102]

4. AT&T Impermissibly Inflates Its Transport Cost Estimates by Including Opportunity Costs

AT&T says that its business case analysis of the cost of fiber deployment for transport "also reflects the opportunity cost of using capacity on the pre-existing metro fiber (*i.e.*, allocated capital)."[103] Any company making any investment of its funds or redeployment of existing fa-

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99 *UNE Remand Order*, 15 F.C.C.R. at 17303, para. 517

100 Remarkably, AT&T claims that it is entitled to UNEs without consideration of how many other competitors are already in a given market.

101 In fact, AT&T makes this very point when it observes that an ILEC with fiber in place avoids the cost of fiber construction and thus requires little incremental investment to add a DS1 or a DS3. *See* AT&T Comments, Att. D at 17-18 ("Now that this fiber infrastructure is already in place . . . incremental increases to the ILECs' capacity and reach can be made at extraordinarily low incremental costs . . . .").

102 AT&T says it "prefers to provide service entirely over its own facilities." AT&T Comments, Att. D at 6; *but see id.*, Att. D at 7 (admitting that its most common provisioning method involves leasing facilities from another carrier); *id.*, Att. C at 11 n.9 (suggesting that it is common for "two or three service providers [to] share" a conduit used for running fiber).

103 AT&T Comments at 35 n.11; *id.*, Att. C at 11.

cilities incurs opportunity costs in doing so—including ILECs. While the foregone return on an alternate use of a carrier's metro ring capacity may or may not be an appropriate consideration in a particular carrier's (ILEC or CLEC or other carrier) business case, this is not a factor that in any way relates to whether a fiber optic facility has natural monopoly characteristics that render it unsuitable for competitive supply.[104] As a result, AT&T's inclusion of opportunity cost improperly increases the purported cost of fiber optic loops and transport based on AT&T's particular financial strategy and precludes reliance on AT&T's cost analysis in determining whether impairment exists for these network elements.

5. AT&T Improperly Excludes High-Capacity Loops It Can Self-Provision Without Any Need for Construction

AT&T admits that "virtually all" of the DS1 and DS3 loops that it self-provisions go to locations where AT&T already has fiber optic facilities in place.[105] However, as discussed above, AT&T claims that it does not consider the demand for such services in assessing the cost of initial provisioning of the fiber. As a result, "virtually all" of its loop deployments should involve a near-zero incremental cost (at least based on AT&T's analysis of ILEC loops), because no new outside plant construction would be required and its business case for the preexisting facilities had already provided for full recovery of the cost of construction. Nevertheless, AT&T

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104 In addition, the Commission has previously made clear that opportunity costs are not properly considered in determining the "cost" of network elements. *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket 96-98, *First Report and Order*, 11 F.C.C.R. 15499, 15859-60, paras. 708-11 (1996) (*First Local Competition Order*).

105 AT&T Comments at 42.

has given the Commission just the opposite impression, stating that "[v]irtually all loop deployment requires the placement of new outside plant" costing about $125,000 per mile.[106]

Equally important, AT&T does not consider the very low cost of deploying such loops when it asserts that a carrier is always impaired with respect to providing DS1 loops or fewer than three DS3 loops. In arguing for impairment in such cases, it considers only the cost of cases where new facility construction is involved. But "virtually all" of the DS1 and DS3 circuits AT&T self-provisions entail no incremental construction costs at all. This lack of incremental cost is not reflected in AT&T's estimate of the cost of self-provisioning DS1 and DS3 loops, which it claims always requires expensive outside plant construction. As a result, its cost analysis, based on what must be a relatively insignificant number of cases where there are new facility construction costs, does not rationally address the cost of self-provisioning for a carrier with an efficient architecture. By excluding the vast majority of its DS1 and DS3 installations, AT&T inflates the supposed cost of self-provisioning and thereby precludes the Commission's consideration of its cost analysis altogether.

6. Other Obstacles to Competitive Deployment of Fiber Cited by AT&T Are Irrelevant to an Impairment Analysis

AT&T and other IXC and CLEC commenters cite a number of other obstacles to their deployment of fiber facilities that have no place in any reasoned impairment analysis. All of these are obstacles that any new entrant faces, including the hypothetical efficient competitor that provides the basis for an impairment analysis. These obstacles have nothing to do with any natu-

[106] AT&T Comments at 34-35; *id.*, Ex. C at 9-11.

ral monopoly characteristics of the network element a CLEC seeks to deploy, and are unrelated to the availability of a UNE:

Rights of Way. Any telecommunications carrier seeking to use public rights of way needs to obtain a franchise agreement from the relevant local authorities,[107] whether or not the facilities it seeks to deploy are suitable for competitive supply. Section 253(a) bars state or local franchising requirements that "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service," and Section 253(d) authorizes the Commission to preempt local regulations concerning rights-of-way that violate this provision.[108] Moreover, a CLEC has the right to use the rights-of-way (as well as conduits, ducts, poles, etc.) of ILECs and public utilities in accordance with Section 251(b)(4) and Section 224.[109]

Physical Obstacles. Any telecommunications carrier deploying wireline facilities, copper or fiber, must contend with obstacles such as rivers, railroad tracks, road closures, and historic preservation requirements.[110] None of these obstacles have any relationship to whether there are natural monopoly characteristics associated with supply of a network element, and none of them are the ILEC's responsibility. Moreover, as these obstacles apply to an efficient competitor, they should be reflected in TELRIC rates of ILECs and CLECs alike. They cannot be the cause of any difference in the cost of a CLEC's constructing facilities and purchasing UNEs.

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107 *See* AT&T Comments at 57-58; *id.,* Att. D at 26; ALTS Comments at 65, 73; MCI Comments at 130.

108 47 U.S.C. § 253(a), (d).

109 47 U.S.C. §§ 251(b)(4), 224.

110 *See* AT&T Comments at 58; *id.,* Att. D at 26-27.

Building Access. Any telecommunications carrier hoping to deploy wireline facilities to private premises must obtain the permission of the premises owner.[111] The need to negotiate access does not arise from any monopoly characteristics associated with supply of a network element. In most cases, building owners have not limited access to the ILEC for years,[112] and the Commission has prohibited carriers from entering into exclusive access arrangements in commercial buildings.[113] The Commission has also decreed that CLECs are entitled to access to the poles, ducts, conduits, and rights-of-way of ILECs and public utilities, including risers, within multi-tenant buildings and other multi-tenant environments pursuant to Sections 251(b)(4) and 224.[114] In fact, if the building access issue is a real one, it presents a classic case of an instance where the FCC can take appropriate regulatory action far short of ordering unbundling, as it is required to do under *USTA II*.[115]

Customer Reluctance or Refusal to Move Service. Obviously, any carrier seeking to shift a customer's service from another carrier's facilities to its own must have the customer's permission. Apparently, a large number of AT&T's customers are unwilling to grant permission for the switchover after the contract has been signed and facilities have been deployed.[116] This

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111 *See* AT&T Comments at 58-59; *id.,* Att. D at 27-29; ALTS Comments at 63, 65-6; MCI Comments at 130.

112 *See* letter from Matthew C. Ames, counsel for Real Access Alliance, to Magalie Roman Salas, filed June 16, 2000, in WT Docket 99-217 & CC Docket 96-98, *Promotion of Competitive Networks,* Attachment at 3 (stating that 80 percent of 2100 building owners surveyed allow access to more than one telecommunications carrier and nearly 60 percent allow access to three or more telecommunications carriers).

113 47 C.F.R. § 64.2500.

114 *Promotion of Competitive Networks,* WT Docket 99-217 & CC Docket 96-98, *First Report and Order and Further Notice of Proposed Rulemaking, Fifth Report and Order and Memorandum Opinion and Order, and Fourth Report and Order and Memorandum Opinion and Order,* 15 F.C.C.R. 22983, 23017, 23019-24, paras. 76, 80-84, 87-89 (2000).

115 *See id.,* where the Commission acted to prevent exclusive contracts between LECs and owners of commercial buildings, and released a further notice of proposed rulemaking dealing with residential buildings and grandfathered contracts.

116 *See* AT&T Comments at 59-60; *id.,* Att. D at 29-30; *see also* ALTS Comments at 65.

may impede AT&T from providing the service, but it has not even the remotest connection to a determination whether an efficient carrier is impaired by the ILEC's failure to provide requested UNEs. As far as we can determine, AT&T is asking the Commission to take cognizance of the possibility that it signs up customers who do not really want AT&T's service.[117]

Delays in Facility Construction. AT&T points out that it takes several months to construct fiber optic facilities, and that "[a]s with any type of construction project, unforeseen problems . . . can delay completion."[118] Obviously, it takes time to construct any outside plant that will be used for providing telecommunications service. The delays inherent in such construction are the kind of impediment faced by any entity entering a business requiring construction and have nothing to do with whether the facilities have natural monopoly characteristics. The delays facing the tenth CLEC laying fiber along a route that is highly competitive are similar to those encountered by the CLECs who came before (assuming that none of them used existing conduit). In addition, any such delays would obviously be the result, in part, of AT&T's business decision not to construct any facilities until after the customer has contracted for service.[119] Moreover, such delays are likely to be much less significant if fiber is run through existing conduit than if streets are dug up.

ILECs' Special Access Tariff Provisions. AT&T claims that optional tariff terms to which it voluntarily agreed (*e.g.*, volume and term discounts) in order to obtain more favorable pricing of special access circuits effectively prevent it from deploying competitive fiber optic

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117 *See* 47 C.F.R. § 64.1100 (dealing with unauthorized changes in customer carrier selection).

118 *See* AT&T Comments at 60-61; *id.*, Att. D at 31; *see also* ALTS Comments at 73; MCI Comments at 130.

119 This practice might also account for customers declining to accept AT&T service once construction has been completed.

facilities.[120] AT&T does not cite any Qwest tariffs, so presumably it does not feel impaired in any way in Qwest's region by such tariff provisions; it certainly has not demonstrated any such effect. But even assuming *arguendo* that the generic, nonspecific allegations regarding optional tariff provisions were intended to apply to Qwest, no impairment cognizable under Section 251(d)(2) is alleged. If AT&T voluntarily makes volume and term commitments in order to obtain more favorable prices for special access, it can hardly claim that it is impaired by the failure of the ILEC to provide high-capacity loops and transport, when it is obtaining such loops and transport pursuant to the special access tariff at discounted rates to which it agreed. By choosing to make the volume and term commitments, AT&T may have made facilities construction less economically attractive than would be the case if it were not getting the discounts, but that voluntary choice does not somehow endow the construction of such facilities with natural monopoly characteristics.[121] By the same token, the fact that such volume discounts, should the exist, discourage CLECs from self-provisioning in no way suggests that requiring the special access circuit to be provided as a UNE would make a CLEC any more likely to self-provision it.

What is more, as is discussed further below, the fact that AT&T is using the special access loop at the price that it agreed to pay is conclusive proof that AT&T is not impaired by being required to pay the agreed-upon price for that loop. AT&T's claim is that it cannot construct a loop because AT&T already agreed to purchase a tariffed service, and it does not need two loops. AT&T's logic in this area is simply not intelligible.

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120 AT&T Comments at 61, 149-169; *id.,* Att. D at 32-35.

121 Allegations that IXCs and CLECs are subjected to a "price squeeze" as a result of their employment of special access facilities are addressed in Section II.D.

III. FACILITIES-BASED COMPETITION ALREADY EXISTS OR CAN DEVELOP WITHIN QWEST'S MARKETS, WITH RESPECT TO BOTH RESIDENTIAL AND SMALL/MEDIUM SIZED BUSINESS CUSTOMERS

Certain of the commenting parties argue that the Commission should not consider evidence of intermodal competition in its impairment analysis.[122] These arguments are in direct conflict with the FCC's and the D.C. Circuit's rulings on point.[123] Both the Commission and the D.C. Circuit have determined that competition, or the suitability of a market for competition, must be considered as part of the impairment analysis. In the triggers adopted by the FCC with respect to impairment related to mass market switching and dedicated transport facilities, the Commission concluded that the existence of third party provisioning and wholesale provisioning would preclude a finding of impairment.[124] The FCC concluded further that, even if those triggers were not met, a competitor could not be deemed impaired if the market was suitable for competition, or if competitive supply of the element was feasible.[125]

The Court reiterated this theme when it stated that the FCC must consider all types of competition — including intermodal competition — in its impairment analysis.[126] The Court went further and stated with approval that the FCC's impairment analysis "explicitly and plausibly connects factors to consider in the impairment inquiry to natural monopoly characteristics . . . or at least connects them to other structural impediments to competitive supply . . . [and] the Commission has clarified that only costs related to structural impediments to competition are

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122 *See, e.g.*, MCI Comments at 86-103; Covad Comments at 25-39; EarthLink Comments at 8-9.

123 These arguments also are inconsistent with AT&T's own argument that the relevant market is generally characterized as a natural monopoly.

124 *TRO*, 18 F.C.C.R. at 17291-17310, 17226-17233, paras. 495-520, 399-412.

125 *Id*.

126 *USTA II*, 359 F.3d at 572-73.

relevant to the impairment analysis."[127] The standard, as set forth by both the FCC and the Court, thus permits an impairment finding solely when such impairment arises from barriers created by virtue of a natural monopoly market. It necessarily follows that the existence of competition in a market is conclusive evidence that the market is suitable for competition, and precludes a finding that a market is a natural monopoly and further precludes a finding of impairment for a particular element in that market. For this reason, the existence of facilities-based competition, and the extensive deployment of competitive facilities,[128] must be taken into account for any legally sustainable analysis of impairment for mass market switching, transport, and loop facilities. This is true even if the competitors decline to make their facilities available to CLECs.

Qwest submitted evidence in its Comments demonstrating that there is substantial competition in the provision of mass market narrowband (voice) and broadband services nationwide.[129] This vibrant competition establishes that mass market switching, loops and transport are not bottleneck monopoly facilities, and that the mass market voice sector is not a natural monopoly.[130] Thus, the core element of the impairment standard set out in *USTA II* — that the impairment be tied to structural barriers to entry resulting from natural monopoly characteristics that make entry wasteful — cannot be met.[131] This critical fact, coupled with the availability of network elements pursuant to commercial agreements or tariffs, mandates nationwide findings of no

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127 *USTA II*, 359 F.3d at 571-72.

128 Contrary to CLEC assertions, CLECs are not entitled to an impairment finding based on the allegation that intermodal competitors will not provide access to their facilities to a newcomer. The D.C. Circuit ruled that intermodal competition must be considered even if such competitors do not provide a wholesale alternative to other carriers. *USTA II*, 359 F.3d at 585.

129 Qwest Comments at 34-41.

130 *Id*. at 43-48, 82-83.

131 *Id.* at 15-19.

impairment with respect to mass market switching, transport and loop facilities consistent with *USTA II*.[132]

The Commission must ensure that any impairment test it adopts does not lose sight of the ultimate trigger for finding impairment — the existence of, or suitability of the market for, facilities-based competition negates any possibility of an impairment finding.[133] Any proxy or surrogate data that the Commission's test employs thus must be reflective of where competition exists in a market, or where a market is suitable for competition. As discussed herein, Qwest is experiencing facilities-based competition from other telephone companies, cable companies, and municipalities in a number of its markets — including in some of its smallest, less population-dense markets. Since *USTA II* requires the Commission to consider competition in its impairment analysis, any test adopted by the Commission must be sufficiently flexible to reflect the competitive circumstances in the marketplace.

A. Facilities-Based Competition is Present in Qwest's Markets

The facilities-based competition that has developed in Qwest's region establishes that the use of surrogates or proxies that are too narrow or inflexible as evidence of where competition does or can exist produces false positives — *i.e.*, an erroneous conclusion that impairment exists when, in fact, it does not. Commission failure to consider this widespread facilities-based competition in its unbundling determinations will render those determinations unlawful.

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132 *Id.* at 55-59, 65-76.

133 The FCC has the authority to use data as a proxy or surrogate for competition. *See WorldCom, Inc. v. FCC*, 238 F.3d 449 (D.C. Cir. 2001) (confirming FCC's authority to rely upon thresholds or triggers as proxies for the existence of competition in the context of special access pricing flexibility).

Qwest's region is unique in several respects. It is disproportionately large in size and small in population compared to those of the other RBOCs,[134] and the geography is diverse.[135] Notwithstanding its size, the region is characterized by a low population density[136] and thus encompasses fewer access lines than other RBOC regions.

Only 12 of the Metropolitan Statistical Areas ("MSAs") in Qwest's region are in the top 100, as compared to over 40 for SBC, and over 20 for each of Verizon and BellSouth.[137] Qwest has 1213 wire centers in its entire 14 state service territory. Qwest has 64 MSAs in its territory; 525 of Qwest's wire centers are located outside of MSAs. And, due to the geography, terrain, and population density, most of Qwest's wire centers serve relatively few business access lines compared to other RBOCs. [redacted].

Notwithstanding these unique market characteristics, Qwest faces facilities-based competition throughout its territory from cable operators, independent telephone companies ("ICOs"), and municipalities, all of whom have overbuilt Qwest's network and are offering services as competitive local exchange carriers ("CLECs") within Qwest's region, as well as other CLECs who entered the market after the 1996 Act was enacted. Wireless and Voice over Internet Protocol ("VoIP") providers are an additional source of competition within the region. The prolifera-

134 Qwest serves over 272,000 square miles of territory in 14 states. Teitzel/Orrel Declaration at 3, para. 8.

135 Qwest's region spans the timberland in the Pacific Northwest to the Rocky Mountains, to the farmlands of Iowa and Nebraska, to the deserts in Arizona and New Mexico. Teitzel/Orrel Declaration at3, para. 8.

136 Qwest serves about 15.8 million access lines, approximately 9.5 million of which are residential lines, and approximately 6.3 million of which are business lines. Teitzel/Orrel Declaration at 3, para. 8.

137 Teitzel/Orrel Declaration at 3, para. 9.

tion of these competitors has resulted in Qwest losing access lines at a rate of 4% per year, based on financials as of June 30, 2004.

Cable companies present a significant competitive challenge in Qwest's region. Facilities-based cable companies such as Cox, Comcast, and others, have the ability to offer the "triple play" of telephone, internet access and video services. As Qwest described in its Comments, it has lost significant market share (over [redacted]) in the Omaha MSA to Cox's circuit-switched telephony service.[138] Qwest also sees significant losses to Cox in the Phoenix MSA, and where Comcast is offering the triple play (*e.g.*, in Seattle, Denver, Salt Lake City, Minneapolis, and Portland). Cox is using its dedicated fiber optic networks and hybrid fiber coaxial cable networks to provide traditional circuit-switched telephony in 11 markets and, more recently, VoIP telephony in its Roanoke, Virginia market.[139] Cox serves approximately 6.6 million customers nationwide, offering its "array of broadband products and services to both residential and commercial customers in its markets."[140]

Qwest also has experienced losses due to competition provided by small cable companies (*e.g.*, Bresnan Communications bought AT&T/TCI properties in Wyoming and Montana).[141] Bresnan is now competing with Qwest in Montana, Wyoming, and Colorado. In a recent press release, Net2Phone announced a partnership with Bresnan to deliver voice telephony services via Bresnan's broadband network, and stated:

> Net2Phone today announced that it has signed a Letter of Intent to provide cable voice services for

138 Qwest Comments at 35.

139 Cox Communications, Inc., SEC Form 10-K for the fiscal year ended December 31, 2003 at 5.

140 Id. at 2.

141 Teitzel/Orrel Declaration at 10, para. 17.

> Bresnan Communications, the 13th largest US cable operator, with more than 300,000 video subscribers and over 500,000 homes passed. The parties plan to begin deployment in Bresnan's first market immediately …Net2Phone's Managed Telephony solutions empowers cable operators like Bresnan to provide their subscribers with a primary line replacement service that is equivalent to traditional telephony services in terms of voice quality, features functionality and reliability.[142]

Qwest also faces facilities-based competition from cable operators in South Dakota, including MidContinent Communications, which has overbuilt Qwest's network in Aberdeen [redacted], Mitchell [redacted]), Rapid City [redacted], Sioux Falls [redacted], and Spearfish [redacted]. MidContinent is providing service to both residential and business customers with its network. In fact, six of Qwest's underground copper lines recently were inadvertently severed when MidContinent was upgrading its existing copper facilities to install fiber optic facilities in Sioux Falls to upgrade its service to the Argus Leader newspaper.[143] Other facilities-based competition from cable operators in South Dakota includes Prairie Wave Communications, which has overbuilt in the southern portion of the state including in Canton [redacted], Harrisburg [redacted]), Tea [redacted] and Yankton [redacted].

In one of Qwest's smallest markets, HunTel Communications, a cable telephone provider in Tekamah, Nebraska [redacted], has upgraded its cable system and will be offering telephone service and high speed internet to the city's residents and businesses.

142 *Id.* at 10, para. 17.

143 *"Phone Service Lost in Cut,"* D. Tucker, Argus Leader, Sept. 29, 2004.

"To make the project affordable for local customers, HunTel needed 600 households and 200 business lines to switch from Qwest and use HunTel as their local telephone provider." HunTel is making a similar pitch in other small Nebraska towns like Oakland [redacted] and Lyons [redacted].[144] As demonstrated in Section III.B, cable companies compete for both residential and business customers, both nationally and in Qwest's region.

Qwest also faces competition from ICOs and competitors that entered the market after the 1996 Act was enacted. Much of this competition in Qwest's region is facilities-based. Over half (81) of the CLEC operators in Qwest's region purchase unbundled loops ("UNE-L") from Qwest, meaning that they have their own switching facilities, or acquire switching from third parties.[145] Several of Qwest's competitors have fiber collocations in many of Qwest's wire centers.[146] There are fiber collocations in 210 of Qwest's wire centers; [redacted] of which have greater than 5,000 Qwest business access lines.[147] [redacted][148] Of these 210 wire centers with fiber collocations, [redacted] have fewer than 5,000 Qwest business access lines, [redacted] have between 5,000 and 10,000 Qwest business access lines, and [redacted] have between 10,000 and 15,000 Qwest business access lines and [redacted] have over 15,000 Qwest business access lines. [redacted] have fewer than 5,000 Qwest business access lines, [redacted] have between 5,000 and 10,000 Qwest business lines, [redacted] have between 10,000 and 15,000 Qwest

144 Teitzel/Orrel Declaration at 11, para. 19.
145 *Id.* at 6, para. 14.
146 *Id*. at 4-5, para. 11.
147 *Id*. at 4-5, para. 11.
148 *Id.*

business access lines and [redacted] have over 15,000 Qwest business access lines.[149] The existence of fiber collocations at smaller wire centers demonstrates that the number of access lines is not determinative of where self- or third-party provisioning of transport and loop facilities is possible.

And, Qwest has more ICOs (500) in its region than any other RBOC.[150] Many of those ICOs have overbuilt in Qwest's region, and are providing facilities-based service in direct competition with Qwest — often in wire centers with less than 5,000 business lines. Some examples follow:[151]

- Idaho:

  - a subsidiary of Cambridge Mutual Telephone installed its own switch and distribution facilities, and is the exclusive telecom provider in the Hidden Springs development in Qwest's Eagle wire center. Qwest has no presence in this development, which has [redacted].

  - Project Mutual Telephone Company (PMT) overbuilt Qwest's Burley exchange [redacted] with its own fiber and copper network, and is providing communications services in the Magic Valley area of Idaho (includes Burley, Heyburn, Oakley, Twin Falls and Rupert). "Project Mutual Telephone is in the middle of a big push to get fiber-optic cable installed throughout Burley. When the company completes its $6 million project in Burley in about 18 months, the entire city will be blanketed with PMT's telephone, cable and Internet service, said Charlie Creason, PMT General Manager." As a result of facilities-based competition in Burley, Qwest has lost [redacted] of its business and residential access lines in that area.

- Iowa:

  - CommChoice of Iowa, LLC ("CommChoice"), has overbuilt Qwest's network in the Whiting ([redacted] and Onawa [redacted] exchanges in Qwest's territory. CommChoice provides service through resale and facilities based provisioning to residential and business customers.

149 *Id.*

150 Id. at 14, para. 24.

151 Id. at 14-21, para. 24.

- Goldfield Access Network, L.C. ("GAN") provides facilities-based telephone service in the communities of Clarion [redacted] Eagle Grove [redacted] Humboldt [redacted] and Renwick [redacted], all of which are in Qwest's Iowa service territory.

- HickoryTech, formerly known as Crystal Communications, Inc., provides facilities-based local and long distance telephone service to cities within Qwest territory including Waukee, Urbandale, Clive, and West Des Moines, as well as communities in Minnesota. HickoryTech has been actively building facilities in the Iowa communities it serves. For example, in the western Des Moines metropolitan community of Waukee [redacted]), HickoryTech has overbuilt Qwest's network to provide local and long distance services and DSL to both residential and business customers. According to a July 10, 2000, presentation made to the Waukee City Council by Milo DePhillips, HickoryTech General Manager, the company chose Waukee in part because of its continued strong population growth and substantial "high-end" residential concentration as well as being contiguous to an existing HickoryTech market. In a March 24, 2001, *Des Moines Register* article, HickoryTech is quoted as saying that it "is installing phone lines that will reach almost every Waukee resident and business." The article goes on to say, "Milo DePhillips, general manager of HickoryTech, said the switching facility in Urbandale is capable of providing 150,000 to 200,000 lines to the suburbs." HickoryTech currently offers both residential and business local telephone packages, as well as many of the features offered by Qwest, in Iowa.

- South Slope Cooperative Communications Company ("South Slope") provides residential and business service to a number of Iowa communities, including South Cedar Rapids and Coralville (location of the Coral Ridge Shopping Mall, now served by South Slope) where Qwest is the incumbent local service provider. South Slope offers its residential customers basic dial tone service at $13.00 per month and business line service starting at $15.25 per line per month. A variety of calling features, such as Caller ID and Call Waiting, and optional calling plans are also available. South Slope offers its customers high-speed Internet access starting at $34.95 per month and wireless service in conjunction with Iowa Wireless/T-Mobile starting at $19.95 per month.

- Minnesota:

  - Hiawatha Broadband Communications (HBC) has overbuilt Qwest's Winona exchange [redacted] with its own "hybrid fiber-coax network that connects all homes, schools and businesses," and provides communications services, including business offerings, in the Winona area. As a result of facilities-based competition in Winona, Qwest has lost [redacted] of its business and residential access lines in that area

- Montana:

  - MidRivers Telephone has overbuilt Qwest in Terry [redacted], Glendive [redacted], Wibaux [redacted], Fairview [redacted] and Sidney [redacted]. MidRivers has taken between [redacted]. Additional overbuilds have been completed by 3 Rivers Telephone in Conrad [redacted] as well as a subdivision in Billings, Range Telephone in Colstrip [redacted], and Blackfoot in Missoula [redacted].

- New Mexico:

  - Yucca Telecommunications Company received a $21 million Rural Utilities Service ("RUS") loan for broadband delivery, via fiber facilities, in rural New Mexico. Yucca is also a significant POTS and DSL competitor in Portales, NM, a Qwest exchange [redacted]. Reportedly, the purpose of the RUS loan is to take fiber to the curb.

- Oregon:

  - Beaver Creek Cooperative has overbuilt Qwest's Oregon City exchange [redacted]).

- South Dakota:

  - Black Hills Fibercom ("BHF"), a subsidiary of an energy utility company, provides residential and business telephone services via its hybrid coaxial network to Rapid City and Northern Black Hills area [redacted]. BHF reports that it has become the dominant provider of bundled broadband services, local and long distance telephone, digital cable entertainment, high speed internet services in its market area, with more than 26,000 customers and 43,000 telephone access lines in service. BHF's revenues have grown from $0.3 million in 1999 to $39.8 million in 2003. As a result of facilities-based competition in Rapid City, Qwest has lost [redacted] of its business and residential access lines in that area

- Northern Valley Communications has overbuilt Qwest in Aberdeen [redacted].

- Sancom/Santel Communications has overbuilt Qwest in Mitchell [redacted].

- Wyoming:

  - Silver Star Communications has overbuilt Qwest facilities within the City of Afton [redacted]. In an order issued in July 2004, the Wyoming Commission found that any "existing economic, regulatory or technological barriers to entry appear to have been successfully overcome" and that "the Afton situation constitutes an…instance of true, robust facilities-based local exchange service competition in Wyoming, all the more remarkable in that it has developed in one of Wyoming's smaller local exchange service markets."

  - Allwest has overbuilt Qwest's network in Evanston [redacted].

  - Tri-County TCT has overbuilt Qwest in Cody [redacted]) and Powell [redacted].

Municipalities also have overbuilt Qwest's network, particularly in wire centers with less than 5,000 business lines. For example:[152]

- Iowa:

  - Qwest's network has been overbuilt by Algona Municipal Utilities [redacted], Alta Municipal Broadband Communication Utility [redacted] Laurens Municipal Communications Utility [redacted] Mapleton Communications Management Agency [redacted], Osage Municipal Communications Utility [redacted], Spencer Municipal Communications Utility [redacted]. As a result of facilities-based competition in Spencer, Qwest has lost [redacted] of its business and residential access lines in that area.

[152] Teitzel/Orrel Declaration at 21-23, para. 25.

- New Mexico:

  - The City of Las Cruces, NM [redacted] has begun the installation and sales off of city-owned WiFi systems as a competitive challenge to Qwest's DSL deployments. The city obtained an economic development grant from the federal government to fund this venture.

- Oregon:

  - The City of Albany contracted with NOANET to install a fiber network for the city and school district [redacted]; the City of Ashland has a fiber network deployed throughout the city which was originally designed as a cable service [redacted]; the City of Portland (IRNE network) is a facilities based overlay network.

- Utah:

  - A group of cities, including Salt Lake City, is forming UTOPIA, a taxpayer funded fiber network to compete against Qwest, Comcast and other telephone companies.

- Washington:

  - The City of Tacoma has the CLICK network that provides hi-cap services and internet access to residential and business customers in the Tacoma metropolitan area. NoahNet is a consortium of Public Utility Districts which has a fiber network that they lease capacity on to a number of other wholesale providers throughout Washington and Oregon.

B. Cable Companies Compete to Provide Services to Business Customers

Cable operators are perhaps the most significant source of wide-scale competition in the provision of voice, high-speed data and video services to both the residential and small/medium enterprise ("SME") markets. It is well-known that cable operators pass a significant percentage of the residential market — 96% of U.S. television households — over 98 million homes.[153] By

[153] Report, "*Cable Telephony in Small Businesses: The Competitive Threat to ILECs 2004-2009*," The Insight Research Corporation, May 2004 at 8 (*Cable Competitive Threat Report*).

upgrading their existing plant,[154] cable operators have been successful at achieving significant penetration rates in the residential market for their existing offerings of circuit-switched telephony.[155] What is less known — but critical for purposes of the Commission's impairment analysis — is the substantial SME[156] customer base that cable operators have access to with their existing plant.

A recent report prepared by The Insight Research Corporation[157] indicates that there are 6.98 million SMEs in the United States.[158] *More than 6.27 million of those SMEs are "located within the operating areas of all cable operators.*"[159] Thus, the bulk of SMEs are readily accessible to cable operators. SMEs account for more than 53 million of the 64 million business telephone lines in the country.[160] Therefore, in cable markets, SMEs account for 48.9 million business lines.[161] If all cable systems offered two-way cable telephony, *90.7% of all SME business lines would reside within cable operator markets.*[162] Currently, there are more than 3.13 million SMEs located within two-way capable operating areas of cable operators.[163] Access to SME cus-

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154 Cable began significant upgrades to their existing networks in the mid-90s by building hybrid fiber/coaxial networks to increase capacity so they could offer additional services. *Cable Competitive Threat Report* at 8.

155 *Cable Competitive Threat Report* at 10 (noting that some of the largest cable operators, including Cox and MediaOne, began introducing cable circuit-switched telephony services to the residential market in 1997, and that, by the end of 2002, there were more than 2.5 million residential subscribers of cable telephony across the U.S. — the cable operators were thus able to garner two percent of the residential telephone market in less than five years.).

156 SMEs are defined as businesses with fewer than 500 employees. Of those, 6,029,794 are very small businesses (with between 1-19 employees), 800,822 are small businesses (20-99 employees), and 151,498 are medium businesses (100-499 employees). *Cable Competitive Threat Report* at 14, 86.

157 The Insight Research Corporation is an independent research company founded in 1990 that conducts market research on issues affecting the telecommunications marketplace. Additional information on the firm can be obtained at <http://www.insight-corp.com>.

158 *Cable Competitive Threat Report* at 19.

159 *Cable Competitive Threat Report* at 1, 2 (Table 1-1), 19-21, 87 (emphasis added).

160 *Cable Competitive Threat Report* at 1, 15-17.

161 *Cable Competitive Threat Report* at 22, 23 (Figure II-7).

162 *Cable Competitive Threat Report* at 23.

163 *Cable Competitive Threat Report* at 23, 24 (Figure II-8).

tomer locations within the cable operators' footprints is as simple as installing a drop to the location from the cable operators' existing network.[164]

There do not appear to be any hard data available concerning the actual number of high-capacity business lines provided by cable operators. AT&T claims that there are only 30,000 coaxial cable connections to medium and large businesses, pointing to the *TRO*, which drew its conclusion from data in an FCC report on high-speed Internet access.[165] That source, however, does not indicate the number of high-capacity business lines provided by cable operators. The "coaxial cable" figure cited in the report appears to include only traditional "cable modem" service, not DS1 and DS3 loops, which would be reported as "other wireline" service provided by a "non-ILEC," along with all other DS1 and DS3 services provided by CLECs.[166] The report does not distinguish among categories of non-ILECs, so no conclusions can be drawn regarding the number of DS1 and DS3 circuits provided to businesses by cable operators.

In fact, cable operators can and do easily and economically serve SMEs within their footprints. "The same upgraded network that services the residential segment also passes the SMEs

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164 Teitzel/Orrel Declaration at 8, para. 16.

165 AT&T Comments at 77 & n.39, *citing TRO*, 18 F.C.C.R. at 17009-10, para. 40, n. 128, which in turn cited Industry Analysis and Technology Division, Wireline Competition Bureau, *High Speed Services for Internet Access: Status as of June 30, 2002* (Dec. 2002). AT&T also cited an updated version of that report, which showed the same 30,000 large and medium business telephone lines delivered by coaxial cable. *See* Industry Analysis and Technology Division, Wireline Competition Bureau, *High Speed Services for Internet Access: Status as of June 30, 2003* (Dec. 2003) ("*2003 High Speed Internet Report*"), <http://www.fcc.gov/ Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/hspd0604.pdf>. The figures in both reports are incomplete, due to the omission of certain data to protect confidentiality.

166 The services are classified based on the final technology used to deliver them to the subscriber; thus, if the service is provided to the subscriber over a coaxial cable interface, it is reported as "coaxial cable," but if it is provided over a traditional telephone industry interface, such as a DS-1 or DS-3 or its equivalent, it is reported as "other wireline." *See 2003 High Speed Internet Report* at 2 n.6, Table 5 n.1. For example, the report indicates that a SDSL line that is used to deliver T1 or similar services would be reported as "other wireline" and not as "DSL." *Id.* at 2 n.6.

that are located within the service area boundary."[167] With the advent of VoIP in particular, cable companies have a unique opportunity to use their existing plant to expand their service offerings and revenue opportunities. The *Cable Competitive Threat Report* concludes that "the same serving footprint can generate additional revenue with minimal additional costs, since the cable operator will be able to use the same self-installation modem services for small businesses that are used for residential customers."[168] The Cable Competitive Threat Report goes on to say that "[i]f the MSO bundles voice with the cable modem service, the economics become even more compelling."[169] Comcast recently confirmed its commitment to upgrade its networks to provide VoIP-based services.[170] Deals between cable companies and VoIP providers have started to emerge, evidencing cable operators' intent to seize this opportunity. For example, Net2Phone recently announced a partnership with the National Cable Television Cooperative to provide VoIP services to any of the association's 1,000 cable companies at a fixed rate.[171] The company earlier this year announced a deal with Northland Cable for VoIP services as well.[172] Cable operators MediaCom and Time Warner have formed deals with Sprint and MCI.[173] Access to SMEs with existing cable plant presents a huge revenue opportunity for cable providers. It is

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167 *Cable Competitive Threat Report* at 11.

168 *Cable Competitive Threat Report* at 4.

169 *Id.*

170 Thomas Nagle, a Comcast Vice President, noted at the recent USTA Convention that Comcast already has 1.26 million telephony customers. Proclaiming "We are a telephone company," Mr. Nagle noted that cable had been reluctant to enter the telephony market because of concerns surrounding the available technology, but he added that VoIP "is the solution" for cable, and that 50% of Comcast's network will be VoIP-ready by the end of this year, and 95% VoIP-ready by the end of 2005. *Communications Daily*, Oct. 13, 2004 at 5-6.

171 "*Net2Phone in VoIP Partnership with cable Co-operative*," E. Sheng, Dow Jones Newswires, Oct. 13, 2004.

172 *Id.*

173 *Id.*

reported that the total revenue outlook for bundled data and telephony services from SMEs is $2.5 billion, assuming a conservative penetration rate of 15%.[174]

Recognizing the potential of the SME segment, a number of cable operators are targeting the business customer segment of the market in search of increased customer and revenue bases. Cable operator AT&T Broadband recognized the potential of serving the business market early on, and initially targeted the large business segment for its CLEC-type services. AT&T publicly announced its intent to provide broadband services to its business customers via its coaxial network. In a September 16, 1999 press release, AT&T stated:

> AT&T Broadband Business Services will leverage AT&T's TCG and TCI acquisitions to launch new high-speed services for business customers. We fully intend to make the most of this tremendous market opportunity for AT&T and intend to be the undisputed leader helping businesses meet their needs for both narrowband and broadband Internet services. A key component of AT&T's broadband business services will be the development of its hybrid fiber coaxial cable infrastructure.[175]

Other cable operators, who initially focused on the residential marketplace, have revised their businesses plans and have begun targeting SMEs to offer data-over-cable services or, as in the case of Cox and CableVision, to offer telephony services to SMEs as well.[176] An excerpt from Cable Datacom News states:

> Several major MSOs are increasing the size of their commercial sales units, sharpening their technological tools and pumping up their promotional efforts to capture more of the huge commercial market for telecommunications services, estimated to be more than $140 billion in size. In particular, Time Warner Cable, Cox Communications, Charter Communications, Cablevision Systems and

174 *Cable Competitive Threat Report* at 7, 95 (Table VI-5).

175 Teitzel/Orrel Declaration at 8, para. 17.

176 *Cable Competitive Threat Report* at 68.

> Adelphia Communications are looking to make their market in the business space. With high speed data, digital video and now Voice over Internet Protocol (VoIP) service in their produce portfolio, they're hankering to steal market share away from the phone companies as well as expand the overall commercial market.[177]

These companies have achieved significant success in a very short period of time. For example, Cox is providing local, long distance, high-speed Internet access, web hosting, VPN, and data transport services to a business customer base that includes businesses of varying size as well as government offices and home offices.[178] In the business segment, Cox doubled its base of subscribers in one year — going from 50,000 business customer locations at year-end 2002 to 100,000 locations at year-end 2003.[179] Its revenues from service to this business customer base were $270 million as of year-end 2003.[180] The bulk of Cox's customer locations were in the SME segment, with "90% of the locations employing fewer than 21 employees."[181] That Cox intends to continue to target the SME market is clear — Cox has described its strategy as "going after the low-hanging fruit, the small and medium businesses market that are near the residential network."[182] And, "spokesmen for cable operator Cablevision say that [the] company expects to garner a 50 percent market share of the SME business within their territories by 2007."[183]

Business service also is a key strategic focus for Bresnan. In a July, 2004 press release, Bresnan stated:

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177 Teitzel/Orrel Declaration at 10, para. 17.

178 *Cable Competitive Threat Report* at 71.

179 *Id*.

180 *Id*.

181 *Id*. at 71, 72 (Figure V-2).

182 *Id*.at 73.

183 *Id*.at 94.

> Bresnan Business Services, a division of Bresnan Communications, has announced that it has passed a significant operational milestone having now signed agreements with more then 1,000 customers. A single-source provider of advanced broadband communications services, Bresnan Business Services designs and installs custom bundled and commercial cable modem solutions for businesses and institutions of all sizes across its service area of Montana, Wyoming and Colorado.[184]

Cable operators do not need to have a business customer directly on their cable television distribution network in order to deliver DS1 and DS3 services. These services are typically provided by using fiber-optic facilities from an appropriate location in the operator's HFC (hybrid fiber cable) distribution network. In less densely populated areas, deployment of such fiber facilities is much less expensive than the cost of deploying fiber in urban downtowns. In fact, AT&T's figures show that the cost of burying fiber in low-density areas can be less than $10,000 per mile, which is a small fraction of the cost of building underground conduit structures in urban areas (up to $396,000 per mile), as discussed in Section I.C, *supra*. As a result, in lower-density areas, cable operators are able to leverage their existing networks at a relatively low cost to provide facilities-based services to business customers.

Facilities-based service offerings from cable companies in the SME sector compete directly with incumbent LEC offerings of both narrowband voice and broadband services. In Qwest's region, the report reflects that approximately 360,000 SMEs, representing 2.9 million SME lines, are at risk.[185] The cable operators to which those lines are vulnerable in Qwest's region include Cox (93,658), AT&T Broadband (99,724), Time Warner (28,121), Charter (35,811), Mediacom (23,441), Cable One (13,260), MidContinent (13,156), Adelphia (13,421),

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184 Teitzel/Orrel Declaration at 10, para. 17.

185 *Cable Competitive Threat Report* at 106, 107 (Tables VI-16 and VI-17).

Bresnan (13,681), Cable America (7,162), Comcast (5,738), Bend Cable (3,648), Northland (1,928), News Press & Gazette Co. (1,805), and US Cable Corp. (137).[186] In total, "[m]ore than 24 million LEC business lines, or 50 percent of the SME business lines in the US, could be at risk to ILECs if broad deployment of cable telephony occurs within the two-way cable plants."[187] While the report reflects the market status as of year-end 2003, the evidence reflects that "MSOs are continuing to upgrade their networks increasing their ability to service a greater number of the SMEs."[188]

The foregoing evidence demonstrates that the Commission must be careful in using population density, or other broad surrogates for economic opportunity, when adopting a proxy for impairment, so that instances of actual facilities-based competition in the marketplace, or the suitability of a market for competition, are not ignored, and false-positives are not produced.

IV. *USTA II* MAKES IT CLEAR THAT THE ACT DOES NOT PERMIT "CIRCUIT FLIPPING" — CONVERSIONS OF SPECIAL ACCESS TO UNES

As discussed in Section I.D, above, the Court could not have been clearer that when carriers are currently obtaining circuits under special access tariffs and using them successfully for the provision of service in a competitive market, there can be no unbundling because a finding of impairment is "precluded."[189] Despite the fact that the question has been asked and decisively answered, some commenters argue that the Commission should allow conversions of existing special access facilities to UNEs. In analyzing circuit flipping, it is important to keep in mind

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186 *Id*.at 109-110 (Table VI-18).

187 *Id*. at 112.

188 *Id*. at 112.

189 *USTA II*, 359 F.3d at 593.

just what is involved, because the existence of a special access circuit provided under tariff has a number of implications which proponents of circuit flipping either confuse or confusingly conflate.

Actual "circuit flipping" entails conversion of an existing circuit purchased pursuant to ILEC special access tariff from the tariffed price to a UNE/TELRIC price. Because the circuit was purchased at tariffed rates and is actually being used by the purchasing carrier, there is no conceivable way to justify lowering the price of the circuit based on the argument that the carrier cannot afford to purchase the circuit. Plus, it costs next to nothing for a provider to add new or different traffic, such as local traffic, to a circuit currently purchased as a special access circuit, and thus it cannot be argued that such addition of traffic somehow bears on impairment. Flipping of an existing circuit simply cannot meet the impairment test.[190] If a carrier cannot afford to purchase the circuit it would not have done so.[191]

The advocates of such circuit-flipping of existing circuits cannot make a serious legal argument for their position in light of the express language of the Act and of the Court, so they ig-

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[190] Some carriers claim that they purchased special access circuits under duress and cannot now conduct a profitable business based on the services they purchased. This argument borders on the silly. If a carrier, for whatever reason, made a bad business decision or engaged in poor network or market planning, it is not entitled under the impairment standard to be bailed out of the consequences of this poor decision by an FCC-manufactured impairment decision. The Act is intended to base impairment analysis on carriers using the most efficient architecture and the most efficient business plan, not any given carrier's business plan, regardless of how inefficient. Moreover, to the extent the Commission believes that the alleged unavailability of DS1s was unlawful, it should address that problem directly in the context of the alleged violators, rather than imposing unbundling on all ILECs in all circumstances. *USTA II*, 359 F.3d at 563.

[191] While the Court found that an impairment finding was "precluded" for carriers actually using special access to provide service, it noted in passing that CLECs were robustly competitive. *USTA II*, 359 F.3d at 593. The Commission has no need to engage in any extensive study of the robustness of competition in order to determine whether there is impairment where special access circuits are in use by competing carriers. A finding of impairment is precluded by the general principle that an efficient carrier is not impaired in providing service if there are adequate substitutes for a desired network element available from the ILEC or another source. TRO, 18 F.C.C.R. at 17127-28, 17326, paras. 246, 546. The availability and successful use of special access meets this standard.

nore the law altogether. For example, AT&T argues for circuit-flipping on policy grounds alone, stating, "From an administrative standpoint, it simply makes no sense to prevent conversions, as this will necessarily require the Commission to referee numerous disputes as to whether the customer is 'new' or the contract is to be renewed."[192] The Commission, of course, can eliminate any opportunity for such disputes by implementing a broader view of the Court's decision and barring any impairment finding where special access facilities are available that can be successfully used in the provision of competitive service. Even if it does not adopt this broad view, however, the Commission can minimize the opportunities for disputes by carefully crafting its rules to avoid opportunities for gamesmanship.[193] In all events, the *USTA II* Court did not give the FCC the flexibility to substitute an "administrability" test for a valid impairment finding in the case of the flipping of existing circuits.

In this regard, it must also be remembered that the addition of traffic to existing special access circuits has an incremental cost of zero, or close to zero. While AT&T *et al.* manufactured an entire natural monopoly theory based on hypothetical ILEC excess capacity, they neglected to consider the fact that their own special access circuits, no matter how they are used, generally have capacity to carry additional traffic. A carrier seeking to implement a business plan for local service with little or no risk (which is really the basis for AT&T's impairment claims) can do so by using its existing special access circuits to carry additional traffic to implement this plan. Note, at its most rudimentary level the absolute prohibition against circuit flipping applies only to the flipping of existing circuits, and does not say anything about how a request for a separate UNE in addition to a tariffed circuit would be treated. Thus, while proper

[192] AT&T Comments at 141.

[193] Attached as Attachment 3 is proposed language for a circuit flipping rule that should eliminate most uncertainty.

application of the impairment test to existing circuits would preclude a carrier from purchasing a UNE along a circuit parallel to an existing special access circuit, the fundamental prohibition against the flipping of an existing circuit is not dependent on how additional circuits are treated—the circuit flipping prohibition is absolute in and of itself.

At a minimum, the Commission should disallow the conversion to UNEs of any special access circuit that is in use for the provision of service by a given carrier to a given customer (and their successors and assigns). It should also make clear in its rules that dodges such as the disconnection of a special access circuit and the reactivation of that circuit or the activation of another circuit that duplicates its functions within 90 days will not avoid the bar on conversions, so the replacement circuit could not be obtained as a UNE. While a customer could have the circuit disconnected and obtain a replacement circuit from another carrier without the replacement being deemed a conversion if the change of carriers was a legitimate transaction, the Commission should not permit carriers to act as proxies for each other in order to engage in circuit flipping.[194]

Some gaming of the system would inevitably occur under a regime where impairment is determined carrier-by-carrier (*i.e.,* where a given carrier could not convert to UNEs, while another carrier could obtain UNEs), even though *USTA II* seemed to indicate that the Commission was not foreclosed as a matter of law from following such an approach.[195] A more workable approach, and one in keeping with the general principle of basing impairment on the efficient carrier, would be to find that for any customer location where special access is being used, no car-

194 See the rule proposed in Attachment 3.

195 *USTA II*, 359 F.3d at 563.

rier is impaired, because the existing use of special access by one carrier demonstrates that an efficient carrier does not need UNEs.

In addition, the proper (but separate) impairment analysis dictates that the Commission must also provide that any additional circuits ordered by a carrier to serve a customer who is currently served using special access would be ineligible for UNE status, because the carrier's successful use of special access to serve the customer demonstrates that it would not be impaired by continuing to do so with additional special access circuits. Moreover, because the "suitable for competition" test applies to analysis of impairment in the context of existing special access circuits as well, the availability and current use of special access within a wire center to provide local service is itself powerful, and conclusive evidence that the market is suitable for competition without the unbundling of the tariffed special access circuits that are being used to provide service.

Finally, the absolute prohibition against circuit flipping must also apply to parts of circuits, and not just to a loop-transport combination. A CLEC currently purchasing a special access circuit cannot "flip" the channel termination portion(s) of the circuit to UNE prices and use its own competitive fiber to supplant the special access interoffice mileage. The circuit flipping prohibition extends to portions of existing circuits, not just to the entire circuit.

V. UNBUNDLING OF ENTRANCE FACILITIES CANNOT BE REQUIRED

Given *USTA II's* mildly worded reversal of the Commission's conclusion that entrance facilities did not qualify as a dedicated transport UNE, the Commission once again faces the question of whether such facilities should be unbundled. Not surprisingly, CLEC commenters

urge that they should be.[196] The Commission must deny these requests. Entrance facilities do not, and cannot, meet the impairment test. Moreover, even if the Commission were to decide that other dedicated transport should be unbundled in some or all markets, the record evidence would compel a finding that entrance facilities are not available as UNEs.

As AT&T states, "the impairment analysis for entrance facilities is exactly the same as that for dedicated transport between ILEC LSOs."[197] As Qwest conclusively has demonstrated, an appropriate statutory analysis cannot support the unbundling of dedicated transport in most instances.[198] Entrance facilities present an extreme instance, however; even the CLECs concede that the opportunity for aggregation of traffic, and thus the economics of self-provisioning, are greatest for entrance facilities.[199] Even if AT&T were correct in its analysis of high capacity loops and transport, entrance facilities could still not be required to be unbundled.

Unbundling of entrance facilities also cannot be justified because any impairment that CLECs may suffer without access to dedicated transport as a UNE cannot be tied to any monopoly characteristic of the facility. As the D.C. Circuit observed, entrance facilities "*exist* exclusively for the convenience of the CLECs."[200] If the CLEC network did not exist, or if the CLEC had not located its switch where it did, the entrance facility from the CLEC network to the ILEC

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196 *See, e.g.*, ALTS Comments at 89-90; AT&T Comments at 50-52; Loop and Transport CLEC Coalition Comments at 86-88.

197 AT&T at 52. *See also* ALTS Comments at 90 ("Competitors entering a market face the same steep entry barriers in seeking to deploy entrance facilities as they do in constructing other transmission facilities such as loops and transport").

198 Qwest Comments at 65-89; *see also* text at Section VI.

199 *TRO*, 18 F.C.C.R. at 17205, para. 367 & n.1122 (noting CLECs' acknowledgement of greatest ability to aggregate traffic on entrance facilities). *See also* AT&T Comments at 45, 52.

200 *USTA II*, 359 F.3d at 586 (citation to 47 C.F.R. § 51.505(b)(1) omitted).

switch would not be required.[201] Thus, the ILEC has no advantage over the CLEC in terms of ability to construct a facility that is necessitated solely by the CLEC's own existence.[202] As the D.C. Circuit stated, the CLEC is just as able as the ILEC to construct the facility "at the costs associated with 'the most efficient telecommunications technology currently available,'" whether the TELRIC standard or some other more realistic standard is utilized.[203]

A requirement that ILECs make entrance facilities available as UNEs cannot be justified under any legal standard for unbundling.

VI. IXCS CANNOT BE DEEMED IMPAIRED AND ELIGIBLE FOR UNE LOOPS AND TRANSPORT

AT&T and others argue that the Commission should eliminate all usage and eligibility restrictions on EELs, as well as on UNE loops and transport in general.[204] In particular, they seek to have all restrictions on IXCs' use of UNEs and EELs lifted. This is simply not permitted under the Act. Instead, now that *USTA II* has clarified that the impairment standard means what the statutory language says, the Commission must adopt rules that prevent the use of UNEs and EELs for the carriage of IXC traffic.

The eligibility of a carrier for UNEs, whether individually or in combination as EELs, depends on whether impairment exists with respect to efficient carriers providing a particular service, such as local exchange or long-distance. Qwest submits that IXCs are *never* impaired

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201 It is no answer to observe that entrance facilities also enable ILECs to complete calls from their own customers to CLEC customers. AT&T Comments at 51. The fact remains that, absent the existence of the CLEC network, the entrance facility would not be required.

202 This is another way of getting at the Commission's concern in the *Triennial Review Order* that unbundling should not be required for a facility that is not part of the ILEC's own network.

203 *USTA II*, 359 F.3d at 586 (internal citation to 47 C.F.R. §51.505(b)(1) omitted). As noted, Qwest does not agree that TELRIC is a valid or reasonable pricing methodology.

204 AT&T Comments at 142-43; Loop and Transport CLEC Coalition Comments at 115-121.

and thus should not be eligible for UNEs or EELs. The long distance market is fully and robustly competitive, and has been since before the 1996 Act. This lack of impairment is not limited to DS1 and DS3 UNEs; rather, IXCs are not eligible for DS0 UNEs, either, because no impairment can be shown in the offering of IXC services on account of the absence of the availability of these facilities as UNEs. As a result, IXCs are also ineligible for EELs that incorporate DS0 loops.

Unbundled network elements can lawfully be used only for services for which a valid impairment finding has been made—otherwise the entire market can be skewed by allowing services that are already fully competitive without the benefit of the gigantic TELRIC price break able to prey on ILEC services and facilities and compete unfairly with facilities-based providers. Nothing could be further from the Act's ultimate purpose of facilities-based competition than a scenario wherein competitors (such as providers of interexchange services) can access UNEs for any purpose or use other than the provision of services for which an impairment finding can be made. This necessity, now made clear in *USTA II*, requires the Commission to reinstate, in a stronger form, the requirement that UNEs be used exclusively for the provision of services for which impairment has been found. Interexchange service is not one of those services.

The Commission cannot find that IXCs are impaired without being afforded access to UNEs, because there is vibrant competition in the provision of interexchange service today using tariffed ILEC access services (where alternative facilities are not used). Such service is provided not only by the traditional facilities-based IXCs, but also by resellers, ILECs, wireless carriers, and VoIP operators. Much of that competition currently takes place using ILEC switched and special access services. UNEs simply are not necessary for carriers to compete in this field and

any impairment finding to the contrary would be frivolous. The long-distance competition that exists based on use of ILEC access facilities simply precludes any finding of impairment.

Equally important, the Commission must be mindful of the serious consequences that would result from permitting the use of UNEs for long-distance service. AT&T is at least honest here, claiming that all special access circuits should be priced at UNE prices, rather than at the tariffed rate.[205] There is no legal or public policy reason to subsidize long-distance companies, who are in a competitive field and are therefore not impaired by a lack of UNEs. The goal of the 1996 Act is to bring to consumers the benefits of competition, not to lard AT&T's coffers at the expense of ILECs or the public.

This means that the FCC must rethink its approach to the use of UNE circuits for multiple purposes. The FCC has traditionally ruled that UNE circuits must have some nexus to local service, initially by carrying a "substantial" amount of local traffic,[206] subsequently by applying the now defunct "qualifying service" test for eligibility and the three-part test for usage.[207] Under the latter, even a token provision of local service would "qualify" the circuit to be used for long distance services. Furthermore, the Commission's service eligibility criteria for loop-transport combinations, which was intended to strengthen the qualifying service test, does not even require a showing that the circuit is actually being used to provide local service. This approach is no longer valid. As the Act, the Supreme Court (Verizon) and both *USTA* decisions make clear, unbundling at TELRIC is a dangerous and potentially anti-competitive tool, one that is reserved for

[205] AT&T Comments at 91-101.
[206] *See, TRO*, 18 F.C.C.R. at 17002, para. 25; *see also Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Supplemental Order Clarification*, 15 F.C.C.R. 9587, 9602, para. 28 (2000).
[207] *TRO*, 18 F.C.C.R. at 16990-91.

elements where a valid impairment finding can be made. Allowing a carrier to obtain a UNE for a valid use (i.e., one for which impairment has been lawfully found) and then to use that UNE to provide a service for which impairment cannot be found would undermine the Act and countermand the law.

The FCC must reinstitute and strengthen local service requirements that prohibit carriers from using UNEs to provide non-eligible services. Any CLEC seeking UNEs, alone or in combination as EELs, should be required to certify in writing, before a service order is provisioned, that it is currently providing local service over that circuit. The CLEC should be required, in this certification, to specify the local telephone numbers to be associated with each DS1, as well as the circuit facility assignment ("CFA") of the interconnection trunk to which the circuit will be terminated. In the event of an ILEC audit, CLECs would be required to produce records to prove that it satisfies each of the service eligibility safeguards and the traffic on their UNEs or EELs is predominantly local. Finally, the Commission should adopt SBC's proposed changes to the service eligibility safeguards, including the application of the safeguards to stand-alone loops and transport, as well as loop-transport combinations and commingled circuits.[208]

Failure to apply the safeguards to stand-alone UNEs will allow carriers to "game" the current restrictions and purchase UNEs to provide services for which they are not impaired without UNEs.

[208] *See* SBC Comments at 98.

VII. COMPETITORS ARE NOT IMPAIRED WITHOUT UNBUNDLED ACCESS TO MASS MARKET SWITCHING

A. No Impairment May be Found for Mass Market Switching Based upon the Existence and Feasibility of Facilities-Based Competition

In its Comments, Qwest demonstrated that the broad deployment of competitive switching facilities nationwide, the existence of substantial facilities-based competition in the provision of mass market voice services, the and the continued availability of switching services from Qwest in its region pursuant to the QPP Agreement compels the conclusion that competitors are not impaired without unbundled access to mass market switching.[209] Notwithstanding this strong case supporting a nationwide finding of no impairment for mass market switching, MCI continues to assert that competitors face economic and operational barriers that merit a finding of impairment.[210] MCI's argument is flawed in several respects. First and foremost, Qwest continues to provide CLECs — including MCI — with switching services, pursuant to the QPP Agreement. As Qwest explained in its Comments, the QPP Agreement has been filed with the Commission, and is available to all requesting carriers in Qwest's region.[211] By entering into the QPP Agreement, MCI itself has demonstrated that the availability of that agreement on a nondiscrimi-

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209 Qwest Comments at 42-59.

210 MCI Comments at 27-125. ALTS and the Minnesota PUC also propose that the Commission require switching to be unbundled, but acknowledge that such relief should be, at most, a transitional measure. ALTS Comments at 91-99; MN PUC Comments at 5-7. (Qwest notes that it already makes available to competitors a reasonable transition with respect to switching services in the context of its QPP agreement, which is available to all competitors in Qwest's region). Other CLECs urge the Commission to reinstate unbundling for switching solely based on generalized assertions that they cannot afford to remain in business without it. Small, Independent CLECs Comments at 3. Similarly, one state commission in Qwest's region proposes continuation of a requirement to unbundled switching, based upon generalized claims that UNE-P fosters competition — without offering supporting evidence. NE PSC Comments at 2-3. And, two states in Qwest's region propose continuation of UNE-P based upon their view, based upon incomplete state proceedings, that Qwest had not provided sufficient evidence of non-impairment. NM Attorney General Summary at 3-4; MT PSC Comments at 3. These claims are unsupported, do not even attempt to consider the impairment factors as set forth by the FCC and the Court in *USTA II*, and must be rejected.

211 Qwest Comments at 55-59.

natory basis is a viable alternative to coerced unbundling where it is available. In addition, it fails to address how the Commission may find impairment when the core element of impairment — that the barriers to entry faced by competitors result from a natural monopoly market — is not present. Moreover, it does not take into consideration developments over the past 18 months that address the operational barriers upon which the Commission has relied in making an impairment finding in the *TRO,* including the "QPP" agreement — to which MCI is a signatory — that makes unbundled switching readily available in Qwest's territory. Indeed, in recognition of these uncontroverted facts, AT&T, previously one of the primary proponents of UNE-P, has acknowledged that switching should no longer be unbundled.[212]

1. There are No Economic Barriers Arising from the Existence of a Natural Monopoly in the Provision of Mass Market Voice Services

MCI asserts that economic barriers, including natural monopoly advantages (such as sunk costs and first mover advantages) exist that impede competitors' entry into the market absent unbundled access to switching facilities.[213] However, both the FCC and the Court already have rejected this argument. Both the FCC and the Court have ruled that a finding of impairment must be tied to natural monopoly market characteristics, such as declining average costs, or to other related structural impediments to competitive supply, including sunk costs, ILEC absolute cost advantages, first-mover advantages, and operational barriers within the ILEC's sole control.[214]

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[212] AT&T Comments at 169-175 (arguing for a batch hot cut process to smooth the transition away from a switching UNE.)

[213] MCI Comments at 74.

[214] *TRO*, 18 F.C.C.R. at 17028-17031, 17033-17034, 17036-17039, paras. 75-6, 80, 86-91; *USTA II*, 359 F.3d at 571-72.

And, both the FCC and the Court properly concluded that mass market switches do not exhibit declining average costs, or large sunk costs.[215]

MCI nonetheless produces an economic model that it claims demonstrates that it is not economical for competitors to deploy their own switching facilities.[216] But MCI's model misses the point. Competitors already have deployed close to 10,000 circuit and packet switches.[217] Even counting solely circuit switches (which would not be appropriate in any proper impairment analysis), competitors already have deployed over 1,200.[218] This broad deployment of competitive switches[219] puts to rest any claim that such deployment is not economically feasible.[220]

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215 *USTA II*, 359 F.3d at 569.

216 MCI Comments at 76-81. MCI's analysis of whether entry into the mass market voice services market is economical in the context of an impairment analysis is flawed in at least one major respect — specifically, MCI includes in its economic analysis costs that all service providers — including the ILEC — must bear. Among the costs that MCI asserts make facilities-based entry infeasible are "loops, switches, the connection between the loop and the switch, collocation, the cost of digitization, concentration and aggregation, transport to the competitive LEC's switch, and the cost of cutting over the loop." MCI Comments at 30. MCI suggests that ILECs do not incur "many" of these costs. *Id.* This is untrue. With the exception of collocation, transport to the CLEC switch, and hot cuts, ILECs incur all of these same costs. And for those costs which they do not incur, RBOCs are required to provide those services to CLECs at below-cost TELRIC rates.

217 Qwest Comments at 45.

218 Qwest Comments at 54.

219 One state within Qwest's region even acknowledges that seven CLECs are providing their own switching, and one CLEC is providing switching to another carrier. UT DPU Comments at 5-6. While some of those CLECs have decided to focus on the enterprise market as opposed to the residential market, the DPU acknowledges that switches can serve either enterprise or mass market customers. *Id.* at 5.

220 MCI's and the New Mexico attorney general's assertions that the appropriate geographic market for switching services is the wire center are incorrect. MCI Comments at 35-42; NM Attorney General Summary at 3. MCI itself acknowledges that there are economies of scale associated with deploying switching facilities on a larger geographic scale, and the New Mexico Attorney General acknowledges that a switch need not be located in the same market as the retail customers is serves. MCI Comments at 39, 42; NM Attorney General Summary at 3. And, contrary to MCI's assertion, collocation of switching facilities at each and every wire center a competitor seeks to serve is not required. *See* MCI Comments at 36-38. CLECs may collocate at a tandem, and provide service to customers that are served by the wire centers subtending that tandem. Thus, contrary to MCI's assertions, competitors can "access the local loop" without being collocated in every wire center. *See* MCI Comments at 40. And, the data that MCI indicates is relevant to a CLEC's investment analysis (tariff data and consumer demographic data) is available on other bases than the wire center. *See* MCI Comments at 38. Finally, MCI's argument is inconsistent with what is happening in the marketplace — where carriers are processing traffic using distant switches. Qwest Comments at 54.

MCI further claims that intermodal competition should not be considered in the context of an impairment analysis for mass market switching.[221] MCI's argument on this point is contrary to both the *TRO* and the *USTA II* decisions, and contradicts real-world evidence of actual, facilities-based competition that intermodal competitors already are supplying for mass market voice services. Cable operators have been providing circuit-switched telephony services since as early as 1997, and have achieved significant market share in several markets, including those within Qwest's region.[222] Contrary to MCI's assertions, which largely ignore cable companies' extensive circuit-switched telephony offerings, cable companies' market success in the deployment of facilities-based circuit-switched telephony demonstrates that cable telephony must be found to be sufficiently "comparable" to ILEC-provided mass market voice services, and must be considered in the impairment analysis. And, as demonstrated in Section III, *supra*., cable companies have a substantial opportunity — and in increasing numbers have begun — to provide both circuit-switched and VoIP services to the small and medium sized business market. As Qwest demonstrated in its Comments, Broadband over Power Lines ("BPL"), wireless, and satellite operators provide additional intermodal competition for voice services. The Commission recently adopted rule changes to further encourage the development of Access BPL systems, stating that its action would facilitate "availability of broadband to wider areas of the country

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221 MCI Comments at 86-103.

222 Qwest Comments at 34-36. The Utah DPU suggests that there is only one facilities-based intermodal competitor within Utah and that the Commission should continue to find impairment for mass market switching because not all customers in Utah can get service form this intermodal competitor. UT DPU Comments at 6. But this is not the standard. The intermodal competition that *USTA II* requires the FCC to consider need not be ubiquitous. Rather, the fact that it exists in a particular market is determinative on the issue of natural monopoly and precludes a finding of impairment.

because power lines reach virtually every home and community."[223] And, Wi-Fi network aggregator Boingo Wireless recently reported a deal with broadband provider Vonage which will allow wireless users to make and receive VoIP calls from Boingo's 11,000 Wi-Fi hot spots worldwide.[224] The existence of facilities-based intermodal competition in the provision of mass market services further demonstrates that it is not a natural monopoly, and thus, impairment without access to switching may not be found.[225]

2. Operational Issues Related to the Deployment of Competitive Switching Facilities Have Been Addressed

MCI's suggestion that there remain operational barriers to competitive deployment of switching facilities ignores significant developments that have occurred over the past 18 months that address these issues. MCI argues that the hot cut process continues to present an operational barrier to entry that warrants a nationwide finding of impairment.[226] As is demonstrated at length in Section VII.B, *infra.*, Qwest has developed a batch hot cut process that resolves the CLECs' concerns.

MCI also asserts that other operational barriers exist, including lack of reliable and complete access to loop make-up information,[227] potential errors and delay with directory listings

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223 News Release, "*FCC Adopts Rules for Broadband Over Power Lines to Increase Competition and Promote Broadband Service to All Americans*" (rel. Oct. 14, 2004).

224 "*Boingo, Vonage to Offer Bundled Wireless VoIP Service*," D. Meyer, RCR Wireless News, Oct. 18, 2004.

225 MCI suggests that competition from cable operators demonstrates that a duopoly exists, and argues that the Commission should require unbundling in order to address that situation. MCI Comments at 93. But this is not the foundation of the impairment analysis. As the Court stated, any impairment warranting unbundling must be linked to structural barriers that arise in the context of a natural monopoly market. A duopoly, by definition, is not a natural monopoly.

226 MCI Comments at 47-70.

227 MCI Comments at 70-71.

where a customer changes carriers multiple times,[228] potential delays in the porting of telephone numbers to new service providers,[229] and delays associated with the exchange of customer service records.[230] MCI also argues that incumbents have no incentive to remove those operational barriers because they want to keep CLECs on their networks to earn revenue.[231] MCI suggests that the Commission direct the states to initiate hearings on these matters.[232]

Contrary to MCI's claims, these purported "operational barriers" do not exist. Indeed, in recognition of this fact, the Commission declined to direct the states to address these issues, in stark contrast to the FCC's direction to the states to hold proceedings related to the processing of hot cuts.[233] Further, Qwest provides loop make-up and customer record information to CLECs. The ICONN database provides the percentage of IDLC and UDLC as a percentage of total lines on a central office basis, and the Raw Loop Data Tool provides CLECs with a granular view of loops and loop segments by wire center.[234] Qwest also provides loop make-up data in bulk via the Wire Center Raw Loop Data Tool.[235] Qwest's loop make-up data is very complete and accurate — based on Qwest's data regarding loop make-up inquiries and related follow-up inquiries, its information has been unavailable or not clear in only .549% of all inquiries.[236] Furthermore, even if the Commission were to credit MCI's allegations, despite evidence to the contrary, this

228 MCI Comments at 71-72.
229 MCI Comments at 73-74.
230 MCI Comments at 72-73.
231 MCI Comments at 43-44.
232 MCI Comments at 46-47.
233 *TRO*, 18 F.C.C.R. at 17287, para. 488.
234 Qwest Comments, Attachment 1 ("Pappas Declaration") at 32-33, para. 49.
235 Pappas Declaration at 33, para. 50.
236 Pappas Declaration at 35, para. 51.

would not mandate an impairment finding. Rather, the Commission would need to address these issues directly before imposing the costs of unbundling on the economy.[237]

MCI's general claim that ILECs have no incentive to remove those barriers also is incorrect, and is inconsistent with AT&T's basic theory. Apparently, MCI claims that ILECs are deliberately establishing operational barriers in order to maximize the use of UNE-P, an argument that simply does not pass muster upon analysis. As MCI notes in its Comments,[238] Qwest has entered into a commercial agreement with MCI for the continued provision of the functionalities offered by UNE-P, as well as the benefits of a process with reduced rates for batched hot cuts.[239] The QPP Agreement resolves any outstanding operational or economic issues surrounding mass market switching, and precludes an impairment finding in Qwest's region. Further, MCI's assumption that ILECs want CLECs on their networks at any cost is incorrect. As Qwest has demonstrated, TELRIC-based rates do not permit Qwest to recover its costs.[240] Thus, keeping a competitor on the ILEC network, at prices that equate to a loss for that ILEC, is not an attractive proposition, and undercuts MCI's theory.[241]

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237 *USTA II*, 359 F.3d at 569.

238 MCI Comments at 45.

239 Qwest Comments at 55-59.

240 Qwest Comments at 60-61.

241 As Qwest's Comments explain, Qwest is interested in negotiating commercially reasonable agreements that permit CLECs to continue to lease network elements at prices that permit Qwest to recover its costs and a reasonable profit — such as the QPP Agreement. Qwest Comments at 57-58. This is different, however, from being willing to continue subsidizing CLECs with below-cost rates where those CLECs are not impaired.

3. MCI's Proposed Modifications to the FCC's Impairment Triggers for Mass Market Switching are Unreasonable

MCI suggests that the Commission should modify the triggers in its mass market switching impairment analysis to exclude several types of facilities-based carriers from consideration. As explained in Qwest's Comments, and in Section VII.A above, the record evidence supports a nationwide finding of no impairment with respect to switching facilities — the Commission need not even get to its trigger analysis, and, in any case, could not use the unlawful triggers adopted in the *TRO*.

B. Qwest's Batch Cut Process Addresses CLEC Concerns

1. Introduction

Certain of the commenting parties, including AT&T, MCI and some state commissions in Qwest's region, argue that the hot cut processes offered by ILECs do not address sufficiently the operational barriers associated with the individual hot cut process, and urge the Commission to adopt minimum standards or a nationwide process for batch hot cuts.[242] Qwest has established a batch hot cut process ("BHCP") in its region that addresses the concerns raised by AT&T and

[242] AT&T Comments at 171-73; MCI Comments at 48-69. Other commenting parties, such as McLeod, urge the Commission to adopt rules governing the batch hot cut process, including proxy rates. McLeod suggests that the rates in Qwest's QPP Agreement with MCI would be a reasonable starting point. McLeod Comments at 34-35. Certain of the state commissions in Qwest's region assert that switching should continue to be provided based, in large part, on general assertions over batch hot cuts. See UT DPU Comments at 4 (suggesting generally that a batch hot cut process is necessary, but not offering any specific argument or assessment of Qwest's batch hot cut process); MT PSC Comments at 4 (noting that the 14-state proceeding that Qwest initiated to adopt a batch hot cut process was terminated, and assuming that Qwest has not proceeded along toward implementing the program that was developed through months of coordination with CLECs in its region). Since neither of these state commission comments address Qwest's batch hot cut process, their assertions should be summarily dismissed.

MCI.[243] Qwest described in detail the pertinent features of its BHCP in its Comments and in the Pappas Declaration filed therewith.[244]

Qwest's BHCP is based upon a 14-state-wide coordinated effort *initiated at the joint request of Qwest and the CLECs (including AT&T and MCI) in its region.*[245] The carriers exchanged information and ideas over the course of several months, and all parties, including the state commissions, expended significant resources in furtherance of a viable BHCP in Qwest's region. Further, Qwest and MCI have agreed to a BHCP and have incorporated that process into an amendment to MCI's interconnection agreement in all 14 Qwest states. This is precisely what the *TRO* envisioned. The Commission should not now undercut those efforts by ignoring the progress that was made.

2. Qwest's BHCP is Seamless and Efficient

Qwest's BHCP is "seamless and efficient," as envisioned by the TRO.[246] AT&T asserts that a seamless and efficient system should give CLECs control over the date and exact time of a cut-over.[247] As explained in the Pappas Declaration, Qwest is able to implement its BHCP, and accommodate large numbers of conversions daily, based on the automation of certain ordering, statusing and scheduling activities and the efficient batching of central office conversion activi-

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243 MCI couches its concerns in terms of "mechanization" of the hot cut process and suggests that even an automated process would not address CLEC concerns. MCI Comments at 52-53. As explained herein, Qwest and MCI have reached agreement on a BHCP that includes enhancements to Appointment Scheduling and Order Processing systems.

244 Qwest Comments at 49-53 and Pappas Declaration.

245 Pappas Declaration at 26, para. 38. While AT&T and MCI note that many states have not completed the proceedings establishing BHCPs (AT&T Comments, Attachment 1 at 13, para. 30; MCI Comments at 48), Qwest has voluntarily agreed to implement its BHCP, as modified based upon input from CLECs in its region. All improvements associated with the central office BHCP have been implemented. The remaining improvements associated with IDLC will be implemented in 2005.

246 *TRO*, 18 F.C.C.R. at 17286-17290, paras. 487-92.

247 AT&T Comments at 171 and Attachment 1 at 49-52, paras. 115-123.

ties.[248] The introduction of coordination of the exact time of a loop cut-over, undermines Qwest's ability to efficiently process migrations in batches.[249] Indeed, this reality is not unique to Qwest. It is only logical that, where the CLEC itself seeks special, individualized treatment for a particular loop, that function cannot be performed in the context of a generic, automated process. Qwest nonetheless recognizes that some CLECs may require more precise coordination for certain of their loop migrations, and therefore continues to offer its more managed cut-over services to CLECs.[250] Qwest processes over 99% of such managed conversions on time.[251]

AT&T also asserts that CLECs should be able to specify the sequence of their batches, to enable effective preparation of CLEC end-user customers for the migration experience.[252] As noted in the Declaration of Dennis Pappas, in order to attain the efficiencies associated with a batch, the activities must be conducted within parameters including, for example, performing the cuts based on their location in the frame. AT&T argues that this leaves CLECs and their customers "in the dark" as to the start and completion times for the cuts.[253] Qwest's BHCP addresses these concerns in several ways. First, Qwest has designed its BHCP to be performed from 3:00 a.m. to 11:00 a.m. The decision to perform the work during this timeframe was developed with two primary goals in mind — to permit little to no disruption of the end user's service and to permit Qwest technicians to work on the central office frames at a time when there was relatively little other activity within the central office.[254] Second, Qwest has developed an

248 Pappas Declaration at 5, para. 6.
249 Pappas Declaration at 38, para. 56.
250 Pappas Declaration at 5, para. 5.
251 Pappas Declaration at 13, 38, paras. 16, 56.
252 AT&T Comments, Attachment 1 at 56-57, para. 132.
253 AT&T Comments, Attachment 1 at 57, para. 133.
254 PappasDeclaration at 36, para. 56.

on-line states tool that is available to CLECs to monitor not only the progress of their cutovers, but the entire BHCP.[255] Additionally, CLECs can use existing functionality in their switches to "Trap and Trace" Qwest's ANI tests on the line in the batch, thereby receiving instantaneous notification that the cutover of a line is about to begin and when the cutover is complete.[256]

AT&T complains that ILECs should not be permitted to "freeze" customer accounts while the CLEC builds a sufficient number of hot cuts to be processed in a batch. But, as AT&T acknowledges, Qwest's BHCP does not "freeze" accounts pending conversion of the batch[257] — CLECs can, for example, continue to submit feature changes to the existing account as well as other order activity necessary to meet their end user customers' needs.

MCI suggests that the BHCPs of some ILECs are not seamless because they propose provisioning intervals of 15-17 business days.[258] In contrast, Qwest's provisioning interval is seven business days.[259]

Further, as an additional safety net, in the event of a failure during the cutover process, CLECs have a two hour window in which to notify Qwest of the problem and the end user customer can then be returned to its original state.[260]

Finally, Qwest's OSS for its BHCP provides the information sought by CLECs. AT&T's assertion that Qwest does not have any automated notification tools is plainly wrong.[261] Qwest's

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255 Pappas Declaration at 7, para. 7.

256 Pappas Declaration at 47, para. 70.

257 AT&T Comments, Attachment 1 at 60, para. 138.

258 MCI Comments at 58.

259 Pappas Declaration at 43, para. 64.

260 *See* AT&T Comments, Attachment 1 at 61-62, paras. 142-146 (requesting that the FCC require RBOCs to restore service within one hour of the CLEC notifying the RBOC of a failed hot cut). Pappas Declaration at 47-48, para. 69 (the CLEC must advise Qwest of the failure within two hours of work completion as reflected in the Batch Status Tool).

current tools include IMA-EDI (a computer-to-computer interface) and IMA-GUI (a human-to-computer interface), both of which can be integrated with CLEC systems.[262] Qwest also implemented an enhancement to the Appointment Scheduler to include batch capabilities and a new Batch Status Tool, based upon feedback received from CLECs.[263] These enhancement tools are available to CLECs today. These tools will provide all of the specific data identified in AT&T's Comments as necessary for a seamless and efficient BHCP.[264]

3. Qwest's BHCP Rates Are Appropriate

Qwest's BHCP rates are consistent with the principle set forth in the *TRO* that rates under a BHCP should generally be lower than TELRIC-based rates for individual hot cuts.[265] AT&T suggests that most of the rates under Qwest's BHCP are "only a modest reduction" from its individual hot cut rates.[266] This is inaccurate. In most of Qwest's states, the reductions range from 11.5% to 16.8% off of the individual hot cut rates.[267] And, CLECs who sign Qwest's QPP Agreement get further reductions in the BHCP rates.[268]

(footnote continued)

261 AT&T Comments, Attachment 1 at 70-71, para. 164.

262 Pappas Declaration at 20-22, paras. 26-31.

263 Pappas Declaration at 23-24, paras. 33-34.

264 AT&T Comments, Attachment 1 at 64-65, para. 152.

265 *See* AT&T Comments at 171, 173.

266 AT&T Comments, Attachment 1 at 79, para. 182. MCI also criticizes RBOC rates. MCI Comments at 62-63.

267 These percentages were calculated using the rates provided in AT&T's Comments, at Attachment 1 at 79, para. 182. AT&T criticism of Qwest's BHCP rates in Minnesota, Oregon and Utah should be summarily dismissed. The state commissions in Minnesota and Oregon adopted basic hot cut rates based upon CLEC models rather than Qwest's cost data. Those basic hot cut rates are inconsistent with the cost data that Qwest provided to those commissions, and do not permit Qwest to recover the costs associated with completing basic hot cuts. Thus, there is no justification for the proposition that the batch hot cut rates in those states should be lower than the basic hot cut rates. And, the batch hot cut rate in Utah is only very slightly higher than the basic hot cut rate. When viewed in the context of close to 17% discounts in other states, AT&T's claims are diminished.

268 Pappas Declaration at 54, para. 79.

4. Qwest Includes a Process for Migrating IDLC Loops

Qwest's BHCP, together with its Modified IDLC Batch Process, provide for migrations of existing Qwest retail POTS, UNE-P, QPP and resale voice services — including instances when those services are provided over loops that are served by IDLC. AT&T's and MCI's suggestions to the contrary[269] are simply wrong. Qwest's Modified IDLC Batch Process permits each CLEC[270] to migrate up to *40 IDLC loops* in a batch per day per state.[271] This is *in addition to* the overall daily limit of 100 BHC per central office.[272] This option is available to any CLEC who signs either a stand-alone Batch Hot Cut Amendment to its interconnection agreement or signs a Batch Hot Cut Amendment to its interconnection agreement in conjunction with its purchase of QPP.[273] The QPP Agreement also enables CLECs to continue to lease from Qwest the functional equivalent of UNE-P — thus addressing the concern raised by AT&T that competitors should continue to have access to this functionality pending successful migration of loops.[274]

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269 AT&T Comments at 171-72 and Attachment 1 at 25, 27-30, paras. 60, 65-70; MCI Comments at 65-69 (MCI suggests that ILECs unbundle IDLC loops for CLECs by rolling them on to alternate facilities, such as copper or UDLC, even though alternate capabilities (such as the use of a "side-door port", or "hair-pinning" capability) exist. Contrary to MCI's assertion, Qwest does employ those alternate capabilities where available. Pappas Declaration at 30-31, para. 45. Region wide for Qwest, UNE-P loops currently assigned to IDLC average about 10.6% and, of that amount, only about 2% have nothing but IDLC at the Serving Area Interface, meaning that, in most cases, alternative solutions such as copper, UDLC or an INA solution will be used. Further, the issue of IDLC loops was discussed at great length during Qwest's Section 271 application proceedings. In those proceedings, the Commission found, and the CLECs agreed, that IDLC loops present unique, difficult circumstances. Nonetheless, Qwest agreed to provide for migration of IDLC loops in its Modified IDLC Batch Hot Cut process, and memorialized its commitment to unbundle IDLC loops in its SGAT. Pappas Declaration at 32, para. 48. The Commission approved Qwest's Section 271 applications, thus finding these commitments satisfactory.)

270 Unlike other BHCP processes, Qwest's BHCP permits each CLEC to migrate batches of up to 40 IDLC loops. Pappas Declaration at 29-30, para. 45.

271 Pappas Declaration at 29-30, para. 45 (since there are manual processes associated with IDLC hot cuts, Qwest assesses an additional charge in order to recover those costs).

272 Pappas Declaration at 54, para. 79.

273 Pappas Declaration at 29-30, para. 45.

274 AT&T Comments, Attachment 1 at 30-31, paras. 72-73.

AT&T also argues that a BHCP should permit a CLEC to migrate a loop to a third-party carrier's switch.[275] As AT&T acknowledges, however, Qwest's BHCP does permit such migrations.[276]

5. Qwest's BHCP Has Been Independently Tested

AT&T argues that the efficiency of a BHCP should be tested by an independent third party prior to the BHCP being made commercially available.[277] AT&T acknowledges that Qwest's BHCP was tested by an independent third party — Hitachi, but claims that the testing was flawed.[278] AT&T's criticisms do not undercut the validity of the Hitachi test, and do not undermine its conclusion that Qwest's BHCP can handle the migration of both the embedded base of UNE-P loops as well as new loops during the transition period set forth in the *TRO*.[279]

While the initial trial done with Hitachi present was based upon Qwest's initially proposed BHCP, the second trial conducted took into consideration some of the changes to the BHCP that were requested by CLECs and adopted by Qwest. Hitachi's report reflects the results of both of those trials, as well as Hitachi's observations at Qwest's CLEC Coordination Center, Design Services Center, Service Delivery, Loop Provisioning Center, and Central Office Resource Allocation Center, plus Hitachi's consideration of proposed modifications to the BHCP (which Qwest also adopted and is implementing).[280] Qwest conducted additional trials subsequent to the Hitachi trials, which also took into consideration the proposed modifications to the

275 AT&T Comments, Attachment 1 at 31-35, paras. 74-83.
276 AT&T Comments, Attachment 1 at 35, para. 83; Pappas Declaration at 29, para. 44.
277 AT&T Comments at 172.
278 AT&T Comments, Attachment 1 at 42-44, paras. 99-105.
279 Pappas Declaration at 36-37, para. 54.
280 AT&T Comments, Attachment 1 at 43, para. 101.

BHCP, and achieved results consistent with those achieved during the second trial conducted with Hitachi.[281]

AT&T suggests further that Hitachi did not take into consideration feedback from either the state commissions or CLECs.[282] Quite to the contrary, Qwest's proposed BHCP was the product of months of discussions and give and take between Qwest and the CLECs and state commissions in its region.[283] Hitachi's report considered the BHCP, which already included feedback from CLECs, plus additional changes that Qwest agreed to make to its process, based upon further CLEC feedback. Thus, it is untrue to suggest that Hitachi did not have the benefit of CLEC views on issues related to the BHCP.

Finally, AT&T faults Hitachi for assuming that the improvements that Qwest intends to make to its BHCP will work, and for using Qwest's data regarding the numbers of UNE-P subscriber loops that may require migration.[284] Contrary to AT&T's assertion, the fact that Hitachi concluded that Qwest's *existing* BHCP could accommodate both the embedded base of UNE-P loops as well as new loops, and that any improvements would only "serve to expedite the process and create additional efficiencies" — thus rendering actual performance even better than what Hitachi observed — supports *Qwest's* position rather than AT&T's. As Hitachi concluded,

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281 Pappas Declaration at 53-54, para. 77.

282 AT&T Comments, Attachment 1 at 44, para. 104.

283 Pappas Declaration at 4-5, para. 4.

284 AT&T Comments, Attachment 1 at 44, para. 105. MCI also urges the Commission to ensure that any BHCP is scalable — *i.e.*, can handle the necessary migrations from the embedded customer case if UNE-P is no longer available. MCI Comments, p. 56. Qwest has concluded that it would take approximately 109 business days to transition the central office with the greatest number of UNE-P lines in Qwest's region, assuming that Qwest's maximum of 100 lines are converted each day, leaving Qwest plenty of time to complete the conversion of embedded UNE-P subscribers, plus to accommodate new migrations, before the end of the transition period in the *TRO*. Plus, Qwest's QPP Agreement, to which MCI is a party, will likely reduce the number of embedded UNE-P subscribers that need to be converted. Pappas Declaration at 36-37, para. 54.

Qwest's process already works — if it's only going to be made better, CLECs have no cause to complain. And, to the extent that AT&T faults Hitachi for relying on figures from Qwest regarding the number of UNE-P lines that exist *in Qwest's central offices* and may require migration, Qwest wonders what more appropriate source of this information there is than Qwest itself. Curiously, AT&T asserts in many contexts that ILECs are the best, or indeed only, source of information regarding network configurations and facilities. To now argue that such ILEC data cannot be relied upon contradicts those prior assertions.

6. Qwest's BHCP Includes Meaningful Performance Measures

AT&T argues that the Commission should adopt performance measures and standards related to the batch hot cut process.[285] Specifically, it suggests performance measures in the three areas identified by the FCC in the *TRO*: (1) timeliness, (2) quality, and (3) maintenance and repair.[286] Qwest's BHCP already includes these performance indicators, as well as a mechanism by which a state commission may adopt additional performance measures if necessary.[287]

VIII. THE COMMISSION MUST REJECT EFFORTS TO SUBJECT NETWORK ELEMENTS THAT DO NOT MEET THE IMPAIRMENT TEST TO UNBUNDLING AND PRICING UNDER SECTION 251(C) OF THE ACT

As Qwest noted in its comments, ILECs may provide some network elements that are not required pursuant to section 251. These include the elements that BOCs are required to provide pursuant to items 4-6 and 10 of the section 271 competitive checklist, to the extent they are not

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285 AT&T Comments at 173.

286 AT&T Comments, Attachment 1 at 86-89, paras. 195-199.

287 Pappas Declaration at 51-52, paras. 74-75.

subject to section 251 unbundling,[288] as well as other network elements that ILECs may choose to offer on a commercial basis though they are not required to do so by any law or rule.[289]

Many of these network elements were previously held to be subject to a section 251 unbundling requirement under the Commission's earlier overbroad interpretation of section 251. Not surprisingly, then, some parties urge the Commission to use other legal hooks, such as sections 252 and 271, to subject these network elements to the burdens and obligations imposed by section 251. These include arguments that ILECs should be required to combine and commingle non-section 251 network elements, price them at TELRIC rates, file agreements for such elements for state commission approval, and retain the existing rules in place for some indeterminate interim period. These proposals must be rejected on both legal and policy grounds.

A. Well-Established Federal Law Will Ensure Just and Reasonable Rates for Network Elements Not Required Under Section 251

The Commission concluded in the *Triennial Review Order* that network elements provided pursuant to the section 271 competitive checklist (but not required by section 251) are not subject to the Commission's TELRIC pricing standard, but instead are subject to the "just and reasonable" pricing standard of sections 201 and 202.[290] The D.C. Circuit affirmed, holding that "the CLECs have no serious argument that the text of the statute clearly demonstrates that the §

[288] *See* Qwest comments at 97-98.

[289] *See* Qwest comments at 94 & n.326 (noting Qwest's commercial agreement with Covad to provide line sharing, which is not subject to any unbundling requirement).

[290] *TRO*, 18 F.C.C.R. at 17386, para. 656.

251 pricing rules apply to unbundling pursuant to § 271 checklist items four, five, six, and ten."[291]

The Commission correctly concluded in the *Triennial Review Order* that determining just and reasonable prices for section 271 elements is a fact-specific inquiry best made on a case-by-case basis, with reference to relevant factors such as the rates in the ILEC's access tariff and any arms-length agreements for the element in question that the ILEC has reached with similarly situated carriers.[292] Nevertheless, some CLECs call for a comprehensive set of pricing rules to govern section 271 elements.[293] Some CLECs even argue that the Commission should require BOCs to provide section 271 elements at TELRIC rates, either permanently or for an indeterminate interim period.[294] Although the CLECs cast about for federal authority to adopt some new comprehensive federal pricing structure for section 271 elements, and wring their hands about whether TELRIC rates will apply in the mean time, they conveniently ignore the fact that federal law already provides well-established vehicles for determining the reasonableness of federal rates. As the Commission has noted, sections 201 and 202 require that rates be reasonable. Section 208 of the Act and other aspects of the law associated with the Commission's tariffing system allow both the Commission and third parties to challenge any tariffed rate alleged to be un-

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291 *USTA II*, 359 F.3d at 589. Clearly, if there is no argument that TELRIC pricing applies to section 271 elements, there can be no argument that TELRIC would apply to network elements that a BOC is not required to offer under *either* section 251 or 271, but chooses to do so for commercial reasons.

292 *TRO*, 18 F.C.C.R. at 17389, para. 664.

293 *See, e.g.*, Loop and Transport CLEC Coalition Comments at 132-38; PACE Coalition Comments at 109-112.

294 *See, e.g.*, Loop and Transport CLEC Coalition Comments at 135; PACE Coalition Comments at 109-111.

reasonable. And the Commission has clear jurisdiction to investigate any claim of an unreasonable rate or term in a contract filed pursuant to section 211(a).[295]

Some CLEC commenters claim that a case-by-case approach will result in excessive litigation.[296] But the laws governing the offering of interstate telecommunications services have been on the books since 1934, and Qwest's experience since the *USTA II* decision illustrates why these proposals are needlessly over-regulatory. Without any obligation to provide line sharing, either pursuant to section 251 or 271, Qwest negotiated a commercial agreement with Covad to provide line sharing at a rate agreeable to both parties.[297] This agreement is available to any other carrier, and already has been signed by numerous other CLECs.[298] Similarly, despite *USTA II's* vacatur of the FCC's rules requiring unbundled access to mass market switching, thus eliminating UNE-P, Qwest signed a commercial agreement with MCI to provide the functional equivalent of UNE-P pursuant to the QPP agreement.[299] This agreement, too, has been signed by five other CLECs.[300] The CLECs claim that a case-by-case approach to determining just and reasonable rates will result in excessive litigation simply has no basis in fact — certainly not in Qwest's region.

These CLECs also attempt to make much of the fact that the "just and reasonable" rates for these elements will be higher than TELRIC. Some also claim that, because the rates for these services will exceed TELRIC, they will exceed "cost." Neither of these claims supports retain-

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295 CLECs that argue for some new "pricing standard" for section 271 elements fail to acknowledge that "just, reasonable, and non-discriminatory" *is* a pricing standard. *See, e.g.*, Loop and Transport CLEC Coalition Comments at 132.

296 *See, e.g.*, Loop and Transport CLEC Coalition Comments at 134.

297 *See* Qwest Comments at 104.

298 *Id.*

299 Qwest Comments at 55-59.

300 Qwest Comments at 56.

ing a TELRIC pricing standard for elements provided outside the scope of section 251. As the Commission well knows, its TELRIC standard is far from the only metric for determining "cost."[301] TELRIC is, in fact, a very specific and extreme pricing standard. The D.C. Circuit has observed that TELRIC prices "would fall well below the costs the ILECs had actually historically incurred in constructing the elements."[302] As a result, an obligation to sell elements at TELRIC prices can undermine incumbents' incentive to "innovate or invest."[303] TELRIC pricing is an obligation that should not be imposed lightly. Outside the specific context of network elements required by section 251, therefore, the CLECs' arguments about the price differential between the TELRIC price and the just and reasonable price simply have no relevance.

Similarly meritless are claims that ILECs' special access rates for elements provided pursuant to the section 271 competitive checklist are not constrained by market forces.[304] Qwest is confident that its existing special access rates are just and reasonable, and is prepared to defend them if necessary. But that is not the point. Whether or not these rates are constrained by market forces, the Commission's tariffing process, with its opportunities for parties to challenge rates they deem unreasonable, ensures that tariffed rates remain reasonable.[305]

Finally, there is no merit to the claim that application of the 201 and 202 standard to section 271 elements would "render section 271 meaningless" because ILECs' obligations to pro-

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301 *Verizon,* 535 U.S. at 498-502 (calling cost a "chameleon" and describing the difficulty with defining it).

302 *USTA II, 359* F.3d at 562.

303 *Verizon,* 535 U.S. at 551 (Breyer, J., concurring in part and dissenting in part).

304 *See, e.g.,* Loop and Transport CLEC Coalition Comments at 133; AT&T at 181-82.

305 *See supra,* text at Section II.D; *see also* ATT Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, RM Docket No. 10593 (filed Oct. 15, 2002).

vide service in accordance with sections 201 and 202 predate the 1996 Act.[306] "Thus, the BOCs would not be required to do anything different that it [sic] otherwise would have been obligated to do had it not received in-region long distance authority."[307] Prior to the adoption of section 271, the BOCs had no obligation to make available any of the elements listed in items 4-6 and 10 of the competitive checklist. The obligation to provide these elements to competitors — particularly where not required by section 251 — gives considerable meaning to section 271.

B. States Lack Jurisdiction to Review or Approve Rates for Section 271 Elements

Arguments that states should be involved in setting rates for section 271 elements or that contracts for such elements should be filed with state Commissions[308] fail because, as the Commission explained in the *Triennial Review Order*[309] and the court affirmed in *USTA II*,[310] the pricing of section 271 elements falls under the purview of sections 201 and 202. Unlike section 251, which specifies a state role in rate-setting and requires the filing of contracts with the state through its cross-reference to section 252, sections 201 and 202 contain no provisions for a state role. Similarly, section 271, pursuant to which these elements are provided, establishes no state role beyond the consultative function in reviewing applications for in-region inter-LATA long distance entry.[311]

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306 Loop and Transport CLEC Coalition Comments at 134.

307 *Id.*

308 *See, e.g.,* AT&T Comments at 175-182; Arizona Corp. Comm'n Comments at 7-8; AT&T Comments at 175-182; NARUC Comments at 102-04; PACE Coalition Comments at 115-120.

309 *TRO*, 18 F.C.C.R. at 17389, paras. 662-664.

310 *USTA II*, 359 F.3d at 589.

311 *See generally* Qwest Comments at 92-97.

AT&T misses the point when it belabors the Commission's statements from section 271 proceedings that the Commission decides section 271 petitions based on the rates the states put before it.[312] In each of these applications, the central focus was the availability and pricing of network elements provided pursuant to section 271 checklist *item 2*, which requires provision of network elements required by sections 251(c)(3) and 252(d)(1).[313] Such elements are indeed subject to state pricing and filing authority pursuant to section 252.[314] Elements provided pursuant to checklist items 4-6 and 10, however, are subject to different jurisdictional and regulatory standards, as the Commission has made clear.

Indeed, as AT&T points out, the Commission's only concern with respect to the rates for network elements when it processes a section 271 application is that the rates for all network elements required by section 271 (including those required by section 251(c)(3), as referenced in checklist item 2, and those provided apart from section 251, pursuant to checklist items 4-6 and 10) are appropriately set. For checklist item 2 elements, this means that the state has appropriately applied the Commission's TELRIC methodology. For checklist items 4-6 and 10, this

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312 AT&T Comments at 176-179.

313 Similarly, AT&T's citation to the D.C. Circuit's decision upholding the FCC's grant of the Massachusetts section 271 application is out of context. AT&T at 176, citing *WorldCom, Inc., v. FCC*, 308 F.3d 1, 7 (D.C. Cir. 2002). In stating that WorldCom could "not expect the § 271 process to grow into a full-scale rate ratemaking process on the part of the FCC," the Court's point was that critics of the application could not expect the FCC to re-do the work of the state *for the checklist item 2 elements over which the states have ratemaking authority*. 308 F.3d at 5 (describing the controversy as involving elements provided pursuant to "§ 271(c)(2)(B)(ii)" — i.e., checklist item 2).

314 As Qwest pointed out in its comments, states may also have jurisdiction to resolve other issues that parties *voluntarily* include in a section 252 negotiation or arbitration, including rates for section 271 elements. Qwest Comments at 94 (citing *Coserv Limited Liability Corp. v. Southwestern Bell Tel. Co.*, 350 F.3d 482, 487 (5th Cir. 2003)). AT&T stretches this case beyond its holding when it cites it for the proposition that states possess such jurisdiction when parties have not included the other elements in a negotiation for interconnection or elements covered by section 251. AT&T Comments at 179-80.

means, as applicable, that the rates have been appropriately filed in tariffs or reached in commercial agreements that have been appropriately filed with the FCC pursuant to section 211(a).

As noted above, both the tariff process and the FCC's general authority over common carrier contracts filed with it pursuant to section 211(a) provide well-established paths for ensuring that rates are just and reasonable, including complaint procedures.[315] In addition, as discussed above, the experience of Qwest's QPP agreement and its Covad line sharing agreement demonstrate that neither state nor federal pricing standards are necessary to ensure that rates are reasonable — at a minimum, not in Qwest's region. Thus, from a policy perspective there also is no need for an elaborate proceeding, at the state or federal level, to set rates for section 271 elements. Most importantly, however, from a legal perspective, the CLECs' attempts to find legal authority for a state role in the pricing and terms of elements provided pursuant to a provision of federal law that grants them no such role (section 271) all fail in the face of the well-established federal requirements for setting just and reasonable rates in tariffs via section 205 and contracts filed pursuant to section 211(a).[316]

Despite some CLECs' attempts to use the *Qwest Declaratory Ruling* to support a broader state filing requirement, that decision by its own terms requires "that *only* those agreements that contain an ongoing obligation relating to section 251(b) or (c) must be filed under 252(a)(1)."[317]

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315 *See supra*, text at Section VII.D.

316 The PACE Coalition cites language from a 2000 notice of proposed rulemaking regarding the international interexchange marketplace for the proposition that section 211(a) applies only to contracts "'affecting traffic regulated under the Communications Act,'" and argues that contracts for these elements are subject to state jurisdiction. PACE Coalition Comments at 119, citing *Biennial Regulatory Review, Policy and Rules Concerning the International, Interexchange Marketplace,* Notice of Proposed Rulemaking, 15 F.C.C.R. 20,008 (2000). Putting aside the relevance of the source cited, the argument is circular. As Qwest explained in its initial comments, agreements for non-section 251 elements are subject to federal, not state, jurisdiction. *See* Qwest Comments at 92-97.

317 *Qwest Declaratory Ruling,* 17 F.C.C.R. 19337, 19341 n.26 (2002) (emphasis added).

Elements provided solely pursuant to section 271 checklist items 4-6 and 10, or those provided solely at the commercial option of the ILEC absent any statutory requirement, do not fall within its ambit.

In addition to lacking authority under section 271 to set rates or approve contracts for elements provided solely pursuant to checklist items 4-6 and 10, states possess no other authority to do so. As Qwest explained in its comments, states lack residual jurisdiction over these elements.[318] Nor may states assert jurisdiction over such elements pursuant to section 251(d)(3). As noted above, federal law provides a pricing standard (just, reasonable, and non-discriminatory) and a regulatory structure (either tariffs or contracts filed per section 211(a), as applicable). As the Supreme Court has observed, the 1996 Act "unquestionably" took "the regulation of local telecommunications competition away from the States."[319] Inconsistent state regulation, then, could not stand. The Commission's decision permitting states to set prices for directory assistance service, even though the FCC chose not to set prices itself, is not inconsistent. Although, as the Loop and Transport CLEC Coalition notes, BOCs' provision of directory assistance is required by section 271 checklist item 7,[320] the FCC made clear in that decision that its discussion was in the context of ILECs' obligation to provide directory assistance pursuant to section 251(b)(3).[321]

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318 Qwest Comments at 95.

319 *Iowa Utilities*, 525 U.S. at 378 n.6 (Breyer, J., concurring part and dissenting in part).

320 Loop and Transport CLEC Coalition Comments at 139 & n.408, citing *Provision of Directory Listing Information Under the Telecommunications Act of 1934, as Amended*, 16 F.C.C.R. 2736, 2753 (2001).

321 *Id.* at 2751 *passim.*

C. There is No Duty to Combine Elements Not Provided Pursuant to Section 251

In the *Triennial Review Order,* the Commission concluded that BOCs are not obligated to combine elements provided pursuant to section 271 that are not required by section 251.[322] The D.C. Circuit affirmed this conclusion in *USTA II.*[323] The Commission therefore should reject CLEC commenters' arguments in favor of a combination requirement for section 271 elements.[324] As Qwest pointed out in its comments, a combination rule for section 271 elements is both unnecessary from a factual standpoint and inappropriate from a legal standpoint, given the differences in the nondiscrimination requirements as between the two statutory provisions.[325]

Some of these commenters note that the *Triennial Review Order* maintained the commingling requirement, which mandates that ILECs combine section 251 UNEs or UNE combinations with "one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC."[326] Section 271 elements, however, do not fit within the category of "wholesale services" included in the commingling rule; indeed, if they were, it would nullify the "no combination" rule clearly established in the same order with respect to section 271 elements. Reading the two provisions together to give meaning to both, the only logical conclusion is that the Commission did not intend to include section 271 elements in the definition of "wholesale" facilities or services subject to the commingling rule.

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322 *See* Qwest Comments at 98.

323 *See id.*

324 *See, e.g.,* Loop and Transport CLEC Coalition Comments at 134-38; PACE Coalition Comments at 112-115.

325 Qwest Comments at 99-100.

326 *TRO,* 18 F.C.C.R. at 17342-43, para. 579.

In Qwest's region, the QPP offering also eliminates the need for a combination rule. Because CLECs have available an offering that combines all elements necessary to provide local service, a separate combination rule is unnecessary.

IX. NO NEW EVIDENCE HAS BEEN PRESENTED WARRANTING A REVERSAL OF THE COMMISSION'S DECISION ON LINE SHARING

Some of the commenting parties request that the Commission reverse its earlier decision regarding line sharing, and require ILECs to unbundle the high frequency portion of the loop ("HFPL").[327] These comments simply reiterate many of the same arguments that were included in the Petition for Reconsideration filed by Earthlink with respect to line sharing,[328] which the Commission already has incorporated into this proceeding.[329] Qwest demonstrated in its Comments that the Earthlink Petition fails to present a sufficient basis to warrant a reversal of the Commission's earlier decision to eliminate the unbundling requirement with respect to the HFPL — a decision that was affirmed by the Court in *USTA II*.[330] Further, Qwest provides line sharing within its region pursuant to commercial agreement, which it has entered into with Covad and other competitors. This agreement, like the QPP Agreement, has been filed with the Commission, and is available to competitors within Qwest's region upon request. While Qwest will not repeat those arguments here, Qwest notes that the comments submitted by ALTS and Covad make clear that companies seeking the reinstatement of line sharing intend to engage in precisely

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327 *See* Earthlink Comments at 2-11; ALTS Comments at 46-52; Covad Comments at 40-56. Other CLECs urge the Commission to reinstate line sharing based solely on generalized assertions that they cannot afford to remain in business without it. Small, Independent CLECs Comments at 3. As noted with respect to their comments on switching, this commenter has not substantiated its claims or tied them to the impairment standard.

328 Petition for Reconsideration of Earthlink, Inc., CC Docket No. 01-338, filed October 2, 2003 (the "Earthlink Petition").

329 *Order and NPRM* at para. 12 and n. 40.

330 Qwest Comments at 101-06.

the type of arbitrage that Qwest explained was likely to occur if the Commission reinstates HFPL unbundling. As those parties point out, line sharing will permit customers to "retain their traditional baseband POTS service while they try out VoIP service in the high frequency portion of the loop as a second line service"[331] -- thus enabling the VoIP provider to reap huge profits from the provision of voice and data services on the HFPL (while paying almost nothing for the facilities based on current TELRIC prices for the HFPL). This is precisely the regulatory loophole that Qwest's Comments urged the Commission to avoid.[332] Having failed to present any arguments sufficient to justify a reversal of the Commission's earlier decision, and having confirmed that the regulatory arbitrage of which Qwest's Comments warned is, in fact, the strategy that will be employed, the requests of these parties to reinstate line sharing should be denied.

331 Covad Comments at 51; *see also* ALTS Comments at 50.

332 Qwest Comments at 105-06.

CONCLUSION

For the foregoing reasons, and as stated in Qwest's Comments, the Commission should find that there is no impairment nationwide with respect to mass-market switching, high-capacity loops, and transport, and in any event must prohibit all conversions of existing, in-use special access circuits to UNEs.

Respectfully submitted,

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